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Preface

The 2009 volume of De Lege celebrates the successful faculty and student exchange-program between the University of Minnesota Law School and the Uppsala University Law Faculty. The volume starts with papers by Professor Robert A. Stein and Chief Librarian, Professor Ulf Göranson. They cover the background and development of the exchange program, from an American and Swedish perspective respectively.

Thereafter follow papers from researchers from Minnesota Law School and the Uppsala Law Faculty. The papers are divided into five segments: American and Scandinavian Legal Realism, Freedom of Expression as a Human Right, Families across National and Cultural Boundaries, Current Topics in Environmental Law, and Terrorism and Legal Security. Each segment is covered by researchers from both law faculties. The papers were first presented at a colloquium held in Minneapolis in September 2009, and they represent clear evidence on the width and depth of current research.

Mattias Dahlberg
Editor

Innehåll

Robert A. Stein*

The Minnesota-Uppsala Exchange: A Retrospective on 25 Years of Success

Introduction: A Model Exchange Program

The year 2008 marked the 25th anniversary of the remarkably successful exchange program between the University of Minnesota Law School and the Uppsala University Law Faculty. The two schools have much to celebrate: 55 faculty members and 497 students[1] from the two universities have participated in the program, producing significant collaborative international scholarship and broad international education as a result. In addition, the exchange has involved library resources and alumni of both schools. Other law schools planning to develop exchange relationships would do well to model their programs on the Minnesota-Uppsala experience.

This Article proceeds in four parts. First, the Article tracks the origins and development of the Minnesota-Uppsala relationship. Next, the Article discusses the details of establishing the faculty exchange agreement. The third part reviews the development of the student exchange program. And the Article concludes with a discussion of two other categories of exchange—library and alumni—and the benefits that each provides. Key to the success of the Minnesota-Uppsala exchange program is that it involved all four of those constituencies.

* Everett Fraser Professor of Law and former Dean, University of Minnesota Law School. I would like to thank Kyle Hawkins of the University of Minnesota Law School Class of 2009 for his able research assistance in the preparation of this Article.

[1] This includes 13 participants in the 2008-09 academic year.

I. The Minnesota-Uppsala Relationship: Origins and Development

Minnesota's ties to Sweden are older than the state itself. Many Minnesotans seem to have a Swedish great-grandparent somewhere in the family, and one does not have to drive around Minnesota for long before seeing a Swedish flag flying alongside the Stars and Stripes. Our local phone books overflow with Johnsons, Petersons and Paulsons. And a prominent Minnesota cultural heritage landmark is the Swedish-American Institute in Minneapolis.

Despite these deep and lasting cultural ties, the University of Minnesota Law School, founded in 1888, had no formal ties to any Swedish educational programs for the first 96 of its 121 years. Shortly after I became Dean of the University of Minnesota Law School in the fall of 1979, the faculty of the Law School and I sought to correct this. We observed that the practice and scholarship of law was becoming increasingly global. As a new Dean, I believed that the curriculum and entire program of University of Minnesota Law School should reflect the increased international nature of the law, and that forming a tie with a top Scandinavian university would reap great long-term benefits for the students, faculty, library and alumni of both universities.

Serendipitously, Dr. Jan-Erik Wikström, the Swedish Minister of Education, happened to visit Minnesota on a cultural relations trip in the fall of 1980. I arranged to meet with Minister Wikström to discuss the possibility of an exchange program between the University of Minnesota Law School and a Swedish University. Minister Wikström suggested that the Uppsala University Law Faculty would be a good exchange partner, and he advised us to contact Dr. Stig Strömholm, Dean of the Uppsala University Law Faculty.[2]

On October 30, 1980, I wrote Dr. Strömholm a letter referencing Minister Wikström's visit and expressing interest in developing an exchange program.[3] I touched upon the University of Minnesota's strong

[2] Dr. Strömholm, we soon learned, was an enormously accomplished scholar and talented individual. Among other things, Dr. Strömholm had earned doctorates in two subjects and had written novels in three languages. In 1980, after serving as Dean of the Law Faculty for six years, Dr. Strömholm had recently been appointed Vice Rector of Uppsala University. He later was to serve as Rector of Uppsala University.

[3] *See* Letter from Dean Robert A. Stein, University of Minnesota Law School to Professor Stig Strömholm, University of Uppsala, Oct. 30, 1980 (on file with author).

focus on Scandinavian studies. I noted, among other things, that the University of Minnesota Law Library included a substantial number of Swedish documents and legal periodicals, and that the broader University Library included "one of the largest Scandinavian collections in the U.S. …"[4] The University of Minnesota Law School faculty also included some of the most respected international law scholars in the nation, including Professors Robert Hudec (private international law), David Weissbrodt (international human rights law), and Fred Morrison (public international law). Ultimately, I concluded: "What we have in mind is the possibility of entering into an agreement between our institutions that could lead to an exchange of library materials, and exchange of faculty and possibly some joint programs for our respective students here and at Uppsala."[5]

We did not wait long for a reply; Dr. Strömholm wrote back just over a week later, on November 7, 1980.[6] Dr. Strömholm was "pleased and greatly honoured" by our letter and expressed the "greatest interest" in pursuing our proposal for an exchange. At the time of writing, however, Dr. Strömholm had left the Law Faculty deanship to become Vice Rector of Uppsala University.[7] As a result, he forwarded our letter to the new Law Faculty Dean, Anders Agell.[8] Vice Rector Strömholm warned that Uppsala University had only limited "material resources," but concluded: "I hope that something valuable will come out of your initiative …"[9] The initial idea had been set in motion.

We shared Vice Rector Strömholm's encouraging letter with other members of the University of Minnesota Law School and the broader University.[10] Meanwhile, Dean Agell had received our letter from Vice Rector Strömholm and was considering it seriously. On Nov. 28, 1980, Dean Agell wrote to us: "We are interested to cooperate, although we re-

[4] *Id.*

[5] *Id.*

[6] See Letter from Vice President Stig Strömholm, University of Uppsala, to Dean Robert A. Stein, University of Minnesota Law School, Nov. 7, 1980 (on file with author).

[7] *Id.*

[8] *Id*

[9] *Id*

[10] *See* Letter from Nils Hasselmo, Vice President for Administration and Planning, University of Minnesota Law School, to Dean Robert A. Stein, University of Minnesota Law School, Nov. 21, 1980 (on file with author).

commend a start step by step without far-reaching responsibility."[11] Dean Agell wrote that despite Uppsala University's limited economic resources, they were "very positive" about the proposal and wanted to discuss the matter further.[12]

Luckily, Dean Agell already had travel plans in place that would bring him to North America: he was planning to attend a law conference in Edmonton, Alberta, in May, 1981.[13] Dean Agell proposed visiting the Law School in Minneapolis either before or after his Canadian trip.[14] We wrote back immediately that the University of Minnesota Law School would be "delighted" to host him on a visit to Minnesota.[15] Dean Agell promptly arranged to come through Minnesota on his way home from Canada.

Dean Agell arrived in Minneapolis on June 1, 1981.[16] He was accompanied by Ulf Jensen, a young Uppsala University Law Faculty colleague.[17] Over the course of five days, Dean Agell and Professor Jensen met with me and other Minnesota faculty members over coffee, classes, and even local sightseeing.[18] During the visit, Dean Agell, Professor Jensen and I developed the bare bones of an exchange agreement.[19] We worked extensively over the coming months to develop the exchange program details, each party visiting the other's campus on multiple occasions[20] to work out the logistics for a successful long-term exchange relationship.

[11] Letter from Dean Anders Agell, Uppsala University, to Dean Robert A. Stein, University of Minnesota Law School, Nov. 28, 1980 (on file with author).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Letter from Dean Robert A. Stein, University of Minnesota Law School, to Dean Anders Agell, Uppsala University, Jan. 7, 1981 (on file with author).

[16] *See* Tentative Itinerary for Dean Anders Agell and Professor Ulf Jensen June 1–6, 1981 (on file with author). At the time, the Minnesota academic calendar extended into June, while in recent times classes end in early May.

[17] *Id.*

[18] *Id.*

[19] *See* Memorandum from Fred Morrison, University of Minnesota Law School, to Deans Anders Agell, Uppsala University, and Robert A. Stein, University of Minnesota Law School, June 5, 1981 (on file with author).

[20] I first visited Uppsala the week of Sept. 7, 1981. See Letter from Dean Robert A. Stein, University of Minnesota Law School, to Karin Linton, Executive Director, Fulbright Commission, July 27, 1981 (on file with author). I visited again from May 6–22, 1982. *See* Letter from Dean Robert A. Stein, University of Minnesota Law School, to Dean Anders Agell, Uppsala University, Jan. 28, 1982 (on file with author).

II. Establishing the Structure of the Initial Minnesota-Uppsala Faculty Exchange

In 1980, the Uppsala University Faculty of Law included 15 full professors, six "docents"—non-permanent professors—and nine full-time lecturers including doctors in law and judicial clerks.[21] This meant about 30 full-time teachers, plus an addition 50 practitioners serving as adjunct faculty.[22] The student body stood around 1500, and the official study time was 4.5 years (although, as Dean Agell noted, most students took longer).[23] The University of Minnesota Law School faculty was a similar size: about 30 full-time faculty, and 30 part-time faculty.[24] Minnesota had less than half the number of students, however, enrolling about 730.[25]

My initial idea was to model the Minnesota-Uppsala exchange on a pre-existing exchange arrangement the University of Minnesota Law School had with the Universite Jean Moulin (Lyon III) in France.[26] Under the Lyon agreement, one member of the University of Minnesota faculty spent a year at Lyon, and in exchange, a member of the Lyon faculty came to Minnesota for the same period.[27] The Lyon visiting faculty member typically taught a course in civil or comparative law; the University of Minnesota professors in turn taught a course on common or American law.[28] Each university continued to pay the salaries of its own faculty member during the exchange, limiting the program costs to transportation expenses and incidental living expenses.[29]

The agreement that Dean Agell, Professor Jensen and I reached in June, 1981, mirrored the Lyon-Minnesota arrangement almost exactly.[30]

[21] Letter from Dean Anders Agell, Uppsala University, to Dean Robert A. Stein, University of Minnesota Law School, Nov. 28, 1980 (on file with author).
[22] *Id.*
[23] *Id.*
[24] *See* Letter from Dean Robert A. Stein, University of Minnesota Law School to Professor Stig Strömholm, University of Uppsala, Oct. 30, 1980 (on file with author).
[25] *Id.*
[26] Letter from Dean Robert A. Stein, University of Minnesota Law School, to Dean Anders Agell, Uppsala University, Jan. 7, 1981 (on file with author).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *See* Memorandum from Fred Morrison, University of Minnesota Law School, to Deans Anders Agell, Uppsala University, and Robert A. Stein, University of Minnesota Law School, June 5, 1981 (on file with author).

Dean Agell and I planned for the faculty exchange to begin as early as 1982. The agreement called for faculty exchanges every year, for at least one semester each year. We agreed, however, that the issue of student exchange would be more difficult because of "the economic problem of tuition-charging versus tuition-free schools."[31] While the University of Minnesota charged its students tuition, Uppsala University did not. As a result, the two law schools agreed to start the exchange with faculty members and build from there.[32]

The faculty exchange began at a very high level: the first Swedish scholar to participate in the program at the University of Minnesota was none other than the distinguished Vice Rector, Stig Strömholm, who in 1980 had first encouraged us to pursue an exchange relationship. Vice Rector Strömholm taught at Minnesota in the fall, 1982 semester. On our side, the first Minnesota faculty member to teach in Sweden was Professor Carl Auerbach, my immediate predecessor as Dean of the Law School. Professor Auerbach arrived in Uppsala in the Spring term, 1983, where he taught Civil Rights/Civil Liberties. Eventually, Dean Anders Agell became an exchange participant in 1988.[33]

Unfortunately, of the exchange founders, only I have not yet been able to participate in the exchange program. After serving 15 years as Dean, I moved in 1994 to become Executive Director and Chief Operating Officer of the American Bar Association for the next 12 years. I nevertheless was greatly honored in 1993, when Uppsala University awarded me an Honorary Doctor of Laws at the spring commencement ceremonies. In 2006, I returned to the faculty of the University of Minnesota Law School as Everett Fraser Professor of Law.

[31] *Id*.

[32] *See* Agreement, Faculty of Law of Uppsala University and The Law School of the University of Minnesota, Aug. 27, 1981 (on file with author).

[33] Unfortunately, Dean Agell died on Nov. 6, 2008, after a battle with cancer. I am pleased that I had an opportunity to visit with him a final time in May, 2008, when I traveled to Uppsala to participate in an Alumni Day Symposium marking the 25th Anniversary of the exchange.

III. Developing the Basis for a Student Exchange Program

Encouraged by the great success of the first faculty exchange,[34] Dean Agell and I immediately solidified plans to add a student exchange to the agreement. A student exchange, however, had to overcome one principal obstacle: the University of Minnesota charged its students tuition, while Uppsala University (and other Swedish universities) did not. As late as 1981, this financial difficulty cast some doubt over the possibility of a student exchange ever existing. It took some creative problem-solving by both schools to strike a deal.

At first, Dean Agell and I diligently explored a number of funding and grant options[35] with only limited success. Ultimately, we agreed to a simple yet elegant solution: the Minnesota students studying at Uppsala University would pay tuition for their credits just as they would in the U.S. That money, then, would be used to pay the University of Minnesota for tuition for the Swedish students. This agreement formed the basis for what would become the financial backbone of the student exchange program.

The timing of the exchange presented a second obstacle. Because American law students have only four semesters during which they can take electives, we feared that Minnesota students would not want to devote an entire semester to study in Uppsala. Dean Agell sensed, by contrast, that Swedish students would be eager to spend an entire semester (or more) at Minnesota to improve their English skills and their knowledge of U.S. law. Dean Agell and I decided to start with a middle ground: up to 25 American students would visit Uppsala as part of a month-long summer program for which they would pay tuition. Up to 10 Uppsala

[34] The success of the program developed national acclaim fairly promptly. In early 1984, Professor Robert Hamilton of the University of Texas at Austin wrote to me asking to be considered for a faculty position in the Minnesota-Uppsala exchange. *See* Letter from Robert W. Hamilton, Professor of Business Law, University of Texas at Austin, to Dean Robert A. Stein, University of Minnesota Law School, Feb. 6, 1984 (on file with author). Hamilton offered to participate as a faculty member "without a fee or salary." *Id.*

[35] *See* Letter from Patricia McFate, President, The American-Scandinavian Foundation, to Robert A. Stein, University of Minnesota Law School, Oct. 5, 1982 (on file with author) (indicating that the American-Scandinavian Foundation would be unable to provide financial support to the proposed Minnesota-Uppsala student exchange).

students, then, would visit Minnesota for an entire semester. To maintain quality and standards within the exchange program, Dean Agell and I agreed to various checks and balances. For example, each law school's faculty had to approve courses to be taught by the visiting faculty.[36] Second, each school also had to approve a course of study for the students.

In a telephone conversation on March 9, 1982, Dean Agell and I agreed that 10 Uppsala students would visit Minnesota during the 1983-84 academic year. I felt that would provide sufficient time to "finalize the details regarding subsidy of their tuition and lodging arrangements."[37] Meanwhile, my Minnesota faculty colleagues and I worked to develop a curriculum for visiting Swedish students.[38]

The first four Minnesota students, meanwhile, visited Uppsala University as part of the 1983 Summer Program, held May 20–June 23.[39] The curriculum included Civil Liberties (taught by Professor Auerbach), Introduction to Swedish Law (taught by Vice Rector Strömholm), and Swedish Family Law (taught by Dean Agell)—all taught in English.[40] Minnesota students were charged a flat tuition that did not vary with the number of courses taken.[41] One year later, the program was well under way, and included 22 American students—eight from the University of Minnesota Law School and the rest from a variety of other law schools in the United States. The course offerings expanded as well and included Access to Justice, Comparative Tax and Fiscal Policy, and Comparative & International Labor Movements.[42]

As planned, the American summer students paid tuition for their coursework in Sweden. Those funds, in turn, sponsored the Swedish stu-

[36] *See* Letter from Robert E. Hudec, Professor of Law, University of Minnesota, to Nils Mattsson, Professor of Law, Uppsala University, Dec. 20, 1982 (on file with author). See also Letter from Dean Robert A. Stein, University of Minnesota Law School, to Frank B. Wilderson, Vice President, University of Minnesota, Feb. 28, 1985 (on file with author).

[37] Memorandum from Robert A. Stein to File, Mar. 11, 1982.

[38] Professor Strömholm even offered to hire a student research assistant. *See* Memorandum, Student Research Assistant, Nov. 10, 1982 (on file with author).

[39] *See* The University of Minnesota Law School Summer Program (on file with author).

[40] *Id.*

[41] *Id.*

[42] *See* Memorandum from Robert Hudec, International Programs Committee Chair, University of Minnesota Law School, to Faculty, University of Minnesota Law School, May 1, 1984 (on file with author).

dents who arrived in Minnesota several months later for the fall semester. Indeed, in the fall term, 1983, the first ten Swedish students arrived at the University of Minnesota. They enrolled in a variety of standard introductory law courses, all taught in English.[43] In 1984, both sides hosted another round of successful exchanges. The program was becoming a pillar in both schools' international curricula, and it has remained so ever since.

By the late 1980s, however, the financial aspect of the exchange lost its strength due to the increasing costs of legal education in the United States. We recognized in late 1988 that the Uppsala students visiting Minnesota that term would exhaust the available funding derived from the tuition American students paid to study in Uppsala the previous summer. As a result, we informed Professor Bertil Wiman, the new director in Uppsala of the Minnesota-Uppsala Exchange, that beginning in 1989, Minnesota would have to charge tuition for visiting Uppsala students.[44] We arranged for Uppsala students to pay "resident" tuition rates, which stood at almost half the cost of non-resident rates. The tuition payments ensured the funding necessary to continue the program for the long haul.

The next major development occurred in the 1995-96 academic year, when Minnesota began sending students to Uppsala for a full semester to accommodate students' increasing interest in foreign study. Since 1995, up to ten Minnesota students have been eligible to study in Uppsala for one semester each year.

Uppsala students have always been welcomed in the Minneapolis legal community, but the Minneapolis law firm of Dorsey & Whitney LLP recently took the relationship to a new level. Starting in 2008, Dorsey established a mentorship program between local attorneys and Swedish students visiting from Uppsala. Dorsey has hired a number of Uppsala students upon completion of their law degrees, and expects to continue doing so, along with other local firms, in the future.

[43] The Minnesota faculty made some adjustments to accommodate the visiting Swedish students. In particular, faculty members were encouraged to allow expanded time limits on final examinations for visiting students to account for the language barrier. *See* Memorandum from Robert A. Stein to Faculty, Dec. 17, 1984 (on file with author).

[44] *See* Letter from Dean Robert A. Stein, University of Minnesota Law School, to Bertil Wiman, Professor, Uppsala Law Faculty, Sept. 12, 1988 (on file with author).

IV. Expanding the Exchange Program to Include Library Materials and Alumni

A. Library Materials Exchange

The third aspect of the Minnesota-Uppsala relationship involved an exchange of library materials. This idea capitalized on each school's ability to obtain local library resources at a much lower cost than those same resources would be in the other's country.

The library materials exchange—though never subject to a formal, written agreement like the first two aspects of the Minnesota-Uppsala exchange—started in 1984, when Professor M. Kathleen Price, then director of the University of Minnesota Law Library, began an exchange of books with her Uppsala counterparts.

The successful library exchange owes much of its success to Professor Suzanne Thorpe, who serves currently as Associate Director for Faculty, Research, and Instructional Services at the University of Minnesota Law Library. In 1988, Suzanne Thorpe was a rare combination of talents: not only was she a second-year law student, but she was also a professional reference librarian who spoke Swedish fluently.[45] While studying as a law student, she worked half time at the University of Minnesota Law Library, where her responsibilities included developing the library's Swedish collection.[46] Eager to further her understanding of Scandinavian legal bibliography and to advance her relationships with library personnel in Sweden, Suzanne Thorpe joined the Uppsala program as a student for Summer term, 1988.[47]

During her visit to Uppsala, Suzanne Thorpe worked with Professor Bertil Wiman to obtain books from two leading Swedish legal publishers.[48] In particular, Professor Wiman arranged for the publishers to send old and new books to the University of Minnesota Law Library free of charge.[49] Professor Wiman also helped Suzanne Thorpe purchase books

[45] *See* Memorandum from Kathie Price, Law Librarian, University of Minnesota Law School, to Dean Robert A. Stein, University of Minnesota Law School, Feb. 23, 1988 (on file with author).

[46] *Id.*

[47] *Id.*

[48] *See* Letter from Bertil Wiman, Uppsala University Faculty of Law, to Dean Robert A. Stein, University of Minnesota Law School, Aug. 30, 1988 (on file with author).

[49] *Id.*

from a local seller who gave Uppsala University a 40 % discount.[50] This arrangement was enormously beneficial to the University of Minnesota Law Library's Scandinavian collection.

Throughout the 1980s and '90s, Minnesota sent a number of law reviews and other journals to Uppsala. In exchange, Uppsala librarians sent works published by Iustus, the scholarly press at the Uppsala University Law Faculty, to Minnesota. The two schools also exchanged duplicate treatises. The Uppsala University library received extra government depository works and had many to share with Minnesota. Most importantly, each school sent the other legislative history materials and court decisions.

These types of materials exchanges were enormously beneficial prior to the international computerization of libraries and the dawn of the Information Age. Minnesota and Uppsala began to exchange library materials less frequently once information became available online. For example, when government materials began to be issued on the Internet, the two schools stopped sending duplicate works back and forth, choosing instead to rely on the Internet. In addition, Uppsala University Law Faculty began subscribing to American legal databases such as HeinOnline, Westlaw, and Lexis.

Nevertheless, the two schools continue to exchange a handful of materials each year. Professor Thorpe looks back on the exchange relationship as an enormously productive means of expanding Minnesota's collection in the pre-Internet era. Professor Thorpe recently wrote:

> One of the most important benefits of the exchange program between the law school libraries was the exchange of knowledge and good will. In addition to studying in Uppsala while I was in law school, I worked very closely with the law librarians there to gain expertise on Swedish legal sources and research techniques. I have used this knowledge extensively on this side of the ocean and have been able to share it with others through presentations and articles. The law librarians in Uppsala have also visited here several times and learned a lot from us. Both times I taught in Uppsala (2005 and 2008), I provided training to the librarians there. We continue to work closely and consult each other whenever we need help.[51]

[50] *Id.*

[51] E-mail *from* Suzanne Thorpe, Associate Director for Faculty, Research, and Instructional Services, Minnesota Law Library, *to* Kyle Hawkins, Research Assistant, University of Minnesota Law School, March 16, 2009 (on file with author).

More recently the library relationship between the two universities has been strengthened by the appointment of Dr. Ulf Goranson, Professor on the Uppsala University Law Faculty, as Director of the great Carolina Rediviva Library of Uppsala University. Professor Goranson was himself an early participant (1986) in the faculty exchange between the two universities and is extremely supportive of the exchange program.

B. Alumni Exchange

The fourth piece of the exchange relationship was involvement of alumni of the schools in the exchange. In May–June, 1984, I led a large delegation of U.S. judges and lawyers—most of them graduates of the University of Minnesota Law School—on a visit to Uppsala University where they were able to attend continuing legal education seminars and meet with Uppsala University law faculty members. The 44-member group included a U.S. District Judge, a Justice of the Minnesota Supreme Court and two other state trial judges. The group attended nine hours of continuing legal education classes in Uppsala taught by Uppsala University law faculty members, a Swedish Supreme Administrative Court Justice, and Swedish practicing attorneys.[52]

In recent years the Uppsala University Law Faculty alumni program has grown substantially, and in May, 2008 I was pleased to participate in a continuing legal education Symposium in Uppsala for Uppsala University law alumni, along with several of my Minnesota faculty colleagues. Some Minnesota graduates who had participated in the student exchange programs through the years also participated in the Uppsala University Law Alumni Day in 2008.

[52] The courses included: Characteristics of Swedish Law, taught by Vice Rector Stig Strömholm; Family Law in Sweden, taught by Dean Anders Agell; Constitutional Law, taught by Justice Gustaf Petren, Supreme Administrative Court, Stockholm; Corporation Law, taught by Professor Carl Hemstrom; Tax Law, taught by Professor and Vice Dean Nils Mattsson; Law of Procedure in Sweden, taught by Uppsala practicing attorney Peter Danowsky; and Arbitration according to the rules of the Swedish Chamber of Commerce, taught by Stockholm practicing attorney Dr. Ulf Holmback.

Conclusion: Long-Term Success

The Minnesota-Uppsala exchange program emerged as an idea in 1980, when Minister Jan-Erik Wikström and I met to discuss building relationships between the University of Minnesota Law School and Swedish universities. The initial idea turned into a formal faculty exchange thanks to the hard work of several leaders and faculty members of both universities. A student exchange came next, followed by an exchange of library materials and eventually involved alumni of the two schools. All four constituencies have benefited enormously from the relationship, and today the University of Minnesota Law School fondly views the Uppsala University Law Faculty as its academic sibling.

Ultimately, perhaps the biggest reason for the program's success has been the depth of the individual relationships between people at the two schools. Those connections came about thanks to the vision and hard work of what started as a small group of people and has turned into a much broader community over the years. Regrettably, Dean Anders Agell passed away in November, 2008. Rector Stig Strömholm and I continue to be involved with our respective universities. Fifty-five faculty of our two universities have now participated in the exchange.[53] May this remarkable Minnesota-Uppsala exchange continue for generations to come.

[53] These faculty participants are listed in the Appendix to this Article.

Ulf Göranson

Minneapolis – Uppsala

Reflections on a Successful Exchange Program

1. For the first time in more than 22 years, I had the pleasure of making an extended re-visit to Minneapolis in the fall of 2008. The occasion was seminars and other festivities organized to commemorate the 25 years jubilee, slightly vague as to exact dates, of the standing exchange program between the University of Minnesota Law School and the Uppsala University Faculty of Law. I was very happy to be invited to take part in the jubilee events, in spite of the fact that I left the Uppsala Faculty in 1996 to take up the directorate of the University Library.

Immediately after checking into the excellent hotel reserved by our hosts close to the University Mall on the East Bank, I walked over the Mississippi on the old and now rather rusty pedestrian bridge, which I had crossed every day during the spring semester of 1986 to have lunch with colleagues at the Faculty Club in the Coffman Memorial building. I had a brief look at the well-known Law School, now with a new wing added, but I did not stay long since that would be the site for the following days. The changes and novelties on the campus on both sides of the Mississippi gave me a clear impression of the continuous expansion and building activity of the University of Minnesota with the new Art Museum by Gehry as an inspiring jewel, situated dramatically on a cliff and looking as if it might fall at any time into the river far below.

I continued this warm and sunny September afternoon along Washington Avenue to downtown Minneapolis, a giant walk for an American but a short leap for a Swede. The walk had, however, sometimes been rather difficult in the tough Midwest winter of 1986, since the sidewalks were seldom cleared because very few people used them and very few sites along half a mile of this broad street were worth a visit. My wife Maria and I had a small but very cosy apartment in the Crossings on

Washington Avenue and 2nd. During the spring months we could follow true American efficiency when a new high rise was erected on the adjacent site; innumerable trucks lined up to take away what was dug up to construct an underground car park of four or five levels. We left before the new high-rise blocked the view of the Federal Bank building with its fascinating mirror façade that gave us sunlight both from the east and from the west.

Along Washington Avenue now most of the insignificant and empty houses had disappeared and in many places had been replaced with pleasant apartment and office buildings. The impressive new Guthrie Theater rose up near the river and an interesting museum was arranged close by in a mill plant derelict 20 years ago. An attractive park, not very crowded on an ordinary work day, stretched along the river all the way to the new Interstate 35 Bridge, replacing the old, sadly collapsed one, which I had seen from my office window at the Law School. In the 1980s no decent person had any reason to visit the riverbank in this area of the city. Now it was part of a cultural center to be expanded even further. The quite ugly but practical Metrodome was still in its place but said to be torn down soon and replaced by a billion dollar construction elsewhere in the city. The Milwaukee Road Depot dilapidated 20 years ago, the gate to the real downtown where tall buildings started to rise a hundred years ago, was now restored and changed into a hotel complex. Where there were unused tracks in the vast old train shed, was now an area that in winter could be transformed into a giant ice rink.

Downtown Minneapolis had also changed dramatically during the recently-ended building boom. The slightly extended skyways were of course the same, so pleasant to use in wintertime but less needed on this beautiful September day. People were walking along the streets and having coffee or drinks at outdoor tables, a style unheard of in the 1980s. Numerous buses were seen in some streets and even a streetcar, going all the way to the airport.

> From the 1980s I can only remember one bus route along Washington Avenue, which I took some days when the snow and wind were too hard. It was a mode of transport none of the faculty ever seemed to have tried in those days before environmental consciousness became fashionable. Coming from the most "Scottish" province of Sweden, Småland, I got off one stop before the one closest to the Law School and thus traveling within the so-called dime zone and giving me an unbelievably cheap ride. I should add that a very generous colleague lent us a large station wagon in which we

later traveled all the way to the west coast and back—a formidable month-long trip—but Maria had to use it in the Twin Cities to go to her far-off laboratory where she started her pharmaceutical PhD studies.

Many of the typical older Minneapolis buildings were well-kept and many new ones had been erected, some designed by famous architects. The numerous ware houses from the turn of the former century had either been re-used or razed. In some blocks they were replaced for the better, in others for the worse. In many ways it was a different city after 20 years of active development. But at the same time it had the air of the same Minneapolis that in 1986 had meant so much to me personally and as a law don. The city, the Law School, and the people and lifestyle all gave me a variety of lasting impressions.

2. There is a reason why I have allowed myself to start my views on the exchange program by giving a short report of a sentimental journey back to Minneapolis. I have had the great privilege to read a draft of former Dean Robert Stein's contribution to this volume of De lege. It is a brilliant, extensive and accurate description of how the Minneapolis—Uppsala exchange program started and continued, including a list of all the professors who have taken part from each side. I have nothing to add to that, from my point of view, especially since it is more than 15 years since I took an active part in the exchange administration. Instead I would like to share some reflections on how the opportunity to spend a semester at a renowned US Law School added to my experience and had some impact also on its Uppsala counterpart.

3. The program demands, of course, that the visitor teaches a course at the host institution. To give the requested course in comparative law was splendid to me and the confrontation with the American text-book on the subject was a bit of a challenge. I will come back to the pedagogical issues of an exchange program below. I had dealt very little with US law until then. In my dissertation on the transfer of property in movables I compared Swedish law with several European systems. Since a Stockholm scholar in his then-recent thesis had compared Swedish and US law in the related subject of security rights, I had a bit leisurely omitted that system. The study of English law had, however, given me some familiarity with common law thinking.

What could be a better way of learning a foreign legal system than spending a full semester in the midst of the excellent specialists of a law

faculty with the addition of a splendid law library? I really learnt a lot during these months. The most important thing was to get a feeling for of the American legal environment. It is often said that a comparative lawyer can never be as good in a foreign system as in his own. I share that view unconditionally. But you can arrive at better and more appropriate results in analyzing a foreign system only if you try to apply a sort of domestic lawyer's feeling for the questions and problems studied. Reading and continuous discussions with colleagues at lunch, coffee and the rather rare scholarly seminars opened my eyes in a way that studies in isolation never could have.

The importance of case law is evident in any common law system—that I knew. But the enormity of the US case law and the ways of finding relevant cases was, in the days before modern legal databases, a fascinating area to approach. I am not sure I succeeded very well, but I duly collected American material for my then on-going comparative study on *Actio Pauliana* (fraudulent conveyance and transfer), a book that appeared some years later. At least I had learnt a bit about all the pitfalls a foreigner may meet, when trying to enter the American legal scene.

In conclusion, to be given the opportunity to get acquainted with the US legal system was a major advantage of taking part in the exchange program. The splendid Minneapolis law library with its skilled staff was an additional important factor.

4. The University of Minnesota Law Library was known already in the 1980s to be one of the best in the United States. It was certainly complete as regards US material and the stacks, totally open to faculty and students at any time, proved to be a real treasure trove. Not surprisingly it was also very rich in English and Commonwealth law. What was more astonishing was the broad and well-selected content of material from many continental European legal systems, including the Nordic ones. A co-operation between the two libraries of Minneapolis and Uppsala was already drawn up in the founding documents of the exchange program. It has been further developed over the years, also with visiting staff.

Starting my exploration of US law *in situ*, I was impressed and scared by the innumerable cases from all jurisdictions on the shelves in this world, seemingly impossible to overview. I was rather familiar with the English law reports, which now looked almost dwarfed in comparison, not to speak of the Swedish printed reports, easily packed into two normal bookcases. By the time the semester was over, I thought that I

had learnt at least some of the ways of finding relevant cases, but that is another story. What was more important for a comparative lawyer on an exchange program was how to follow and construe the legal reasoning of the judges. Here discussions with colleagues together with reading comments in other cases and in the literature was illuminating but far from sufficient to make me any more than a mere amateur in US law.

Another overwhelming part of the US section of the Law Library was the periodicals collection. I knew that there were many law reviews published but had no idea of the vast number. Neither had I earlier reflected on the policy of choosing the editors and the review mechanisms. I soon got advice from friendly colleagues to read only the latest article on a certain legal problem, since the earlier discussion in case law and literature was meticulously reported therein. This is, of course, an exaggeration but in more than one instance it held rather true. Anyhow, it proved valuable when, back in Uppsala, I supervised students, who were writing exam theses with an outlook on American law and wished to order copies of 20 articles or more on the same subject from journals not available in our own library. Copying costs were reduced.

A more complicated area for a visitor to investigate and evaluate was the American monographic legal literature. The excellent commentaries and textbooks form a corpus having some comparable items in the Swedish material written as commentaries on various statutes. The style and content are, however, very different. Typical for the Swedish scene is the dependence both for courts and scholars on the often extensive *travaux préparatoires*. There is little such in most systems outside the Nordic countries and even if they exist their weight is much less significant. Typical and central to the American system of course are the cases and their construction. Cases form the nucleus of any American book in a totally different way than a Swedish one, not least due to the fact that Swedish law often lacks published cases in many private law areas. One reason, often put forward but never scientifically researched or compared with other systems, is the amount of cases in Sweden decided not by the courts but in arbitration. Another factor is more traditional: almost no first instance court decisions are published and the ones from the appellate courts are only a strictly selected number.

The large or small variations in the USA between the laws of the many states and the efforts in a monograph to harmonize or generalize legal rules and reasoning are a difficulty to the foreign onlooker when trying to reach a more definite analytic conclusion. A rather special material when

studying American law is formed by the Restatements of Law in various areas. They are written in a clear and to a European lawyer easily understandable style, but I must admit that I never got the full insight into how important they are as a source of law in US litigation.

Finding the legal article literature voluminous and the text books and other types of commentaries numerous and varied, I got the impression that monographs on a limited subject—typical in Sweden and continental Europe—were relatively sparser. I quickly learnt that prolific faculty in the Law Schools mostly publish in the form of articles, thus producing in a way more similar to the areas of medicine, natural science, technology, and several social science subjects. As to whether or not the peer review systems are comparable, I cannot judge. The need in Sweden, at least previously, to write two monographs to reach a tenured full professorship is not the starting point in American faculty recruitment. This is not the place to continue a comparison with the types of literature in other legal systems. Needless to say, the amount of literature is dependent on the size of a country in combination with long standing traditions among academic lawyers and the reception of their works in legal practice.

5. It did not need a trained librarian's eye to realize that the resources of the Minnesota Law Library were far beyond what was available at Uppsala University. In those days we had very little US material. For some reason our main library at Carolina Rediviva had since long bought a series of US Supreme Court cases, usable as such but to little avail for anyone trying to go deeper into American law. Later we explored the possibility of buying the law reports available on microfiche, but that also proved to be too expensive. Nowadays, with the electronically-provided legal material in databases, the situation has much improved as it has in so many other scholarly and scientific fields. As for textbooks and periodicals we still have to wait for a richer amount to be available electronically and at an affordable price.

Building a comparative law collection like the one in Minneapolis has not been within our reach in Uppsala, but a continuous enrichment has no doubt taken place. Neither was the number of staff comparable, even if it has been augmented here since the 1980s. The housing in Minneapolis was impressive with ample reading rooms and stacks. The Uppsala situation was later much improved when the law branch of the University Library moved into the old Uppsala Public Library, a fine and classified building by Leche, the city's most important architect in the 1930s. The

tradition at the Minnesota Law School of having leading librarians who also teach in various legal subjects and who take part in the exchange program as visiting professors has no equivalent. I was duly impressed by the services immediately given me in the form of long bibliographical records in the areas of law requested. When I declined the offer of having a shelf meter or two of the literature thus suggested delivered to my office and said that I would prefer to acquaint myself with the tempting stacks, it was almost received with staff dissatisfaction. I also learnt about the various forms of help and support for students of a degree hitherto not matched in Uppsala but which is much more similar today.

On my return visit last fall, library matters had, naturally, another profile than two decades ago. Collection development in a specific field was less important than various service aspects, building matters and administrative complications that burden one's everyday life. I had the pleasure of being warmly welcomed in the Law Library, and visits were cordially prepared for me to other University of Minnesota libraries. The new modes of electronically-based scholarly information give rise to very similar challenges and problems in the library world, totally irrespective of frontiers. The interests of a visiting library director are, thus, quite different from those of a comparative lawyer.

6. As I have indicated, the social contacts between faculty members seemed to me closer and easier in Minneapolis than in Uppsala. Most professors were in their offices during normal hours and easy to approach. Access was smooth and very friendly. The teaching load was heavier than that of a Swedish full professor but the semester shorter. I was welcome to their classes to learn both legal and pedagogical excellence. My wife and I were invited to the homes of many colleagues in law and in pharmacy and also to a few of the students. We could enjoy the warm and spontaneous American hospitability. This was before the era of email and gradually the letter contacts with numerous friends ebbed out, as often happens.

There was, however, one important part of the Swedish faculty life that I saw little of in Minneapolis: the "higher seminars" as we call them. The *doctorands* (PhD candidates) play a very important role in all faculties and departments of a Swedish university. Beside the frequent meetings between supervisor and candidate, his or her provisional texts are discussed at these higher seminars, often with a very critical approach in order for the candidate to improve the style and argumentative power. At the Uppsala Law Faculty, the seminar is composed of a mixture of

senior and junior professors, the group of PhD candidates in the filed, and frequently external lawyers from the areas of legislation, judiciary and practice. Not only PhD candidates but also faculty members provide the basis for deliberations at these seminars with material before going to print, giving valuable insights into on-going research and an opportunity to discuss complicated legal problems and analyze recent cases or articles by others.

In the USA only a few Law Schools give a doctoral degree and Minnesota was not among them. This lack of a very significant research body, the *doctorands*, within the School was the most striking difference to me between Minneapolis and Uppsala. As much as I liked the informal and informative discussions with colleagues, I missed our steady flow of organized seminars on very specific, often quite limited, legal questions.

7. So far I have dealt with the research side of the exchange program, how it was possible to become familiar with American law, to conduct comparative studies, and also, for those not so inclined, to use the excellent library for studies in Swedish law. The other part of the program was the teaching demanded, in my case a rather general course in comparative law.

It was fascinating to meet the American students, most of them extremely industrious and showing a genuine interest in learning more about foreign legal systems. There was already a tradition in Uppsala in many subjects to work with examples handed-out or invented legal situations, when we were not dealing with a more traditional analysis of individual cases or statutory texts. The lively exchange of questions and answers, used in the American Socratic method, had been heard of in Uppsala and some of us had made experiments in different ways in that direction.

During my semester in Minneapolis, I had the pleasure of attending some Socratic hours conducted by expert teachers. It was an intriguing experience, and I personally never came close to what the great masters together with a student group, familiar with the method, could achieve. But I immediately became a firm believer in the basics of the method in order to make the students better prepared and gradually become more skilled in analytical reasoning. When we totally reformed the legal education program in the early 1990s in Uppsala, I served as *Prefekt* (Head of Department or Administrative Dean; there is no immediately corresponding position at an American School of Law). My enthusiastic expe-

riences from Minneapolis went hand in hand with the ideas of other reforming forces at the Faculty and helped to produce what I dare say was a very fruitful result.

Another important "example" I took home from Minneapolis was the open book exams. Normally at the time in Uppsala, the only help for the students in written exams was the large standard edition of the Statutes of Sweden. It was not easy to persuade some colleagues here that knowledge based on the mere memory of certain details in the literature was not a good way to differentiate a good lawyer from a bad. However, the principle of open book exams became an integral part of the reform program in the early 1990s. Whether it still stands, and whether the semi-Socratic method is still in use, I cannot tell almost 15 years after I stopped teaching. I am sure that pedagogical matters and programs have developed further and that the continued exchange program has given many other participants similar stimuli in addition to those I received and warmly cherished.

8. The Minneapolis-Uppsala program was the only organized opportunity for almost a decade for the limited number of ten of our students to study abroad. In the early 1990s, when Sweden and several other former EFTA countries entered into closer co-operation with the European Community, now the EU, a totally new situation emerged. What was then called the Erasmus Exchange allowed European universities to send out and receive students in large numbers under the auspices of one of the major principles of the European idea: the free movement of persons.

The successes of the Minnesota program led me, in my recently mentioned position as *Prefekt*, to work determinedly and expediently for the opportunity of a much larger number of Uppsala students to study abroad for at least one semester. Quicker and easier than anyone could expect, we were able to reach the stated goal to be able to offer a third of our students, i.e. almost 100, a one-semester position as guests at foreign universities, including the very attractive ten positions in Minneapolis. Of course we had to receive a comparable number from all corners of Europe together with the approximately 20 coming from the USA for half a semester under the old program.

The changes of the Uppsala student exchange provisions also led to a favorable development for our American guests. Initially only one course was offered to them. Now we had to run quite a few courses in English for the much larger number of visiting students, almost none of them

able to speak or understand Swedish. A broader choice of subjects was offered and our American guests took courses together with Swedish and other European students. The mix was advantageous to all participants from both sides of the Atlantic.

9. In this rather flowery essay I have recalled memories of one session in the fruitful exchange program established between our two seats of legal learning more than a quarter of a century ago. The time span between 1986 and 2009, when this was written, has in my mind not gilded the recollections. I was equally enthusiastic when returning, as my erstwhile colleagues can confirm. I am sorry that I have only talked for myself here and that I have not had the time and opportunity to make a survey among the many other Swedish participants and even less among the numerous students having taken part in the program. My general view, however, is that for the overwhelming majority the experience has been very favorable and has promoted the several aspects of research and teaching that I have touched upon.

The great values of an exchange program like the Minneapolis—Uppsala link must be given serious recognition and I am convinced, as I had the pleasure to read in Bob Stein's contribution, that both our institutions will do their best to keep the program going forward. There is no less demand these days for a comparative outlook in law and networking beyond borders. Europe is certainly essential to us Swedes but the American scene remains of global importance. The exchange program between us has been of great help to understand the US scene and for some of us even to enter on a shadowy part of it, be it not given a leading role.

Torben Spaak*

Naturalism in Scandinavian and American Realism: Similarities and Differences

1 Introduction

Ever since W. V. Quine published an essay entitled "Epistemology Naturalized" (Quine 1969), naturalism has again become an important topic in core areas of philosophy, such as epistemology (Kornblith 2002), the philosophy of language (Devitt and Sterelny 1999), and the philosophy of mind (Churchland 1988), and it has now reached jurisprudence (or legal philosophy). Accordingly, the task of gaining an understanding of the implications of a naturalist approach to the problems of jurisprudence, such as the place (in the jurisprudential landscape) and shape of empirical theories of legal reasoning, the nature of law's normativity, and the nature and viability of conceptual analysis as a central philosophical tool, is on the agenda of contemporary jurisprudence.

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We should, however, note that some legal scholars advocated a naturalist approach to jurisprudence, and, more generally, to the study of law, already in the 1920's, 1930's, and the 1940's.[1] I have in mind here American Realists such as Oliver Wendell Holmes (1896–97), Felix Cohen (1935; 1937), and Walter Wheeler Cook (1924), and Scandinavian Realists such as Axel Hägerström (1953; 1964), Vilhelm Lundstedt (1925; 1942; 1956), Karl Olivecrona (1939; 1971), and Alf Ross (1946; 1959), among others.[2] These jurisprudential realists – the Scandinavians as well as the Americans – are sometimes taken to make up a third school of jurisprudence, in addition to natural law theorists and legal positivists (see, e.g., McCoubrey & White 1999; Wacks 2005). But this is misleading, for even though both the Americans and the Scandinavians thought of themselves as giving in some sense a realistic picture of law and legal phenomena, they differed in their choice of primary study-object, but also to some extent in philosophical ambition and ability. Whereas the Americans focused primarily on the study of adjudication (see Leiter 2007), the Scandinavians were mainly interested in the analysis of fundamental legal concepts, such as the concept of law, the concept of a legal rule, or the concept of a legal right; and whereas the Americans, except Felix Cohen, were lawyers rather than philosophers, the Scandinavians Ross and Olivecrona were fairly accomplished philosophers of law.[3] The difference regarding the choice of study-object is particularly important, because it means that on the whole the Scandinavians, but not the Americans, operated on the same level as natural law theorists and legal positivists, such as Gustav Radbruch (1956), Hans Kelsen (1934; 1945; 1960), and H. L. A. Hart (1961). Indeed, the Scandinavians were legal positivists themselves.[4]

Nevertheless, it is tempting to think that the Americans and the Scandinavians shared a certain philosophical outlook. Alf Ross, for example, maintains in the preface to his book *Towards a Realistic Jurisprudence* (1946) that Scandinavian and Anglo-American jurisprudents share the

[1] Naturalism was an issue in the German-speaking legal world even earlier, when Hans Kelsen defended normativism against naturalism. Kelsen (1934, ch.3).

[2] See, e.g., Ekelöf (1945); Hedenius (1963); Strömberg (1980; 1988).

[3] Whereas Alf Ross was both a legal scholar and a philosopher, Karl Olivecrona and Vilhelm Lundstedt were legal scholars with a strong interest in philosophy. Hägerström was, of course, a first-rate philosopher.

[4] To be sure, Olivecrona said on more than one occasion that legal positivism was a flawed theory of law. But in saying that he understood by 'legal positivism' the theory that the law is the content of a sovereign will. Olivecrona (1971, chs 1–3).

view that we must understand law and legal phenomena in terms of social facts and conceive of the study of law as a branch of social psychology:

> There should, I think, be good possibilities for a contact between Scandinavian and Anglo-American views in legal philosophy. In both these cultural circles a decisive tendency towards a realistic conception of the legal phenomena is traceable; by this I mean a conception which in principle and consistently considers the law as a set of social facts – a certain human behaviour and ideas and attitudes connected with it – and the study of law as a ramification of social psychology. (Ibid., 9. See also Ross 1959, ix.)[5]

In this article, I argue (i) that the realism espoused by the Americans and the Scandinavians alike is to be understood as a commitment to *naturalism*, conceived of as the ontological claim that everything is composed of natural entities whose properties determine all the properties of whatever it is that exists, or as the methodological (or epistemological) claim that the methods of justification and explanation in philosophy must, as they say, be continuous with those in the sciences, or as the semantic claim that an analysis of a concept is philosophically acceptable only if the concept is analyzable in terms of natural entities.[6] I also argue (ii) that the Scandinavians and the Americans were more alike, philosophically and legally speaking, than one might have thought. For, as we shall see, even though the Scandinavians were primarily semantic and ontological naturalists, and the Americans were mainly methodological naturalists, two of the Scandinavians (Lundstedt and Ross) also embraced methodological naturalism and some of the Americans (Holmes, Cook, and Cohen) also accepted semantic (and, it seems, ontological) naturalism; and even though the Scandinavians were primarily interested in the analysis of fundamental legal concepts, and the Americans were mainly interested in the study of adjudication, some of the Americans were also interested in the analysis of fundamental legal concepts. Furthermore, I suggest (iii) that the commitments to different types of naturalism on the part of these thinkers – both individually and collectively – may explain their respective choice of primary study-object, viz. fundamental legal concepts and adjudication, respectively. Finally, I argue (iv) that the

[5] It is worth noting that Hart (1983b, 161) observed in a review of Ross (1959) that "English and Scandinavian legal theory have long shared many points of view."

[6] As we shall see in Section 6, Leiter (2007) has recently argued that the American realists were methodological naturalists who were concerned solely with the study of adjudication.

modest version of conceptual analysis practiced by the Scandinavians and some of the Americans does not contradict their naturalism.

I begin by introducing naturalism (Section 2). I proceed to consider the sense in which the Scandinavians and the Americans were naturalists (Sections 3–6), and point to some important similarities and differences in their understanding of naturalism and in their choice of primary study-object (Section 7). The article concludes with some thoughts about the alleged incompatibility between naturalism and conceptual analysis (Section 8).

2 Naturalism

Although the term 'naturalism' appears to lack a definite meaning in contemporary philosophy (Papineau 2007, 1; Bedau 1993), writers on naturalism make a fundamental distinction between (i) ontological (or metaphysical) and (ii) methodological (or epistemological) naturalism. Post (1999, 596–7), for example, explains that metaphysical naturalism is the view that "everything is composed of natural entities … whose properties determine all the properties" of whatever it is that exists, and that methodological naturalism is the view that "acceptable methods of justification and explanation are continuous, in some sense, with those in science." (See also Wagner & Warner 1993, 12)

Ontological naturalism is thus a thesis about the nature of what exists: there are only natural entities. But what is a natural entity? I shall assume that it is an entity of the type that is studied by the social or the natural sciences,[7] though I recognize that it is difficult to find a fully acceptable characterization of natural entities.[8] On a more fundamental level, we might perhaps say that a natural entity is an entity that can be found in (what I shall refer to as) the *all-encompassing spatio-temporal framework*.[9] On this analysis, if a contemplated entity, such as God, a natural number, a scientific theory, or a legal norm, cannot find a place in this framework, it isn't a natural entity.[10]

[7] This seems to be the view taken in Brink (1989, 22–3) and in Lenman (2008).

[8] Discussing moral non-naturalism, Ridge (2008) calls the attempt to make a choice between the various available characterizations "a fool's errand."

[9] Armstrong (1978, 261) takes (ontological) naturalism to be "the doctrine that reality consists of nothing but a single all-embracing spatio-temporal system."

[10] For a spirited rejection of ontological (and methodological) naturalism, see Popper (1978).

Methodological naturalism, on the other hand, requires that philosophical theorizing be continuous with the sciences. But what, exactly, does "continuity with the sciences" mean? Brian Leiter makes a distinction between methodological naturalism that requires "results continuity" with the sciences and methodological naturalism that requires "methods continuity," and explains that whereas the former requires that philosophical theories be supported by scientific results, the latter requires that philosophical theories emulate the methods of inquiry and styles of explanation employed in the sciences. He states the following about "methods continuity":

> Historically, this has been the most important type of naturalism in philosophy, evidenced in writers from Hume to Nietzsche. Hume and Nietzsche, for example, both construct "speculative" theories of human nature—modelled on the most influential scientific paradigms of the day (Newtonian mechanics, in the case of Hume; 19th century physiology, in the case of Nietzsche—in order to "solve" various philosophical problems. Their speculative theories are "modelled" on the sciences most importantly in that they take over from science the idea that we can understand all phenomena in terms of deterministic causes. Just as we understand the inanimate world by identifying the natural causes that determine them, so too we understand human beliefs, values, and actions by locating their causal determinants in various features of human nature. (2007, 34–5. Footnotes omitted)

But one may well wonder whether talk about "continuity with the sciences" is not too abstract a formulation to be helpful. The question, of course, is: Which sciences do the naturalists advocating such continuity have in mind? Although Leiter does not go into this, it is clear that the Americans as well as the Scandinavians had in mind the *social* sciences, such as sociology and behaviorist psychology (the Americans) and psychology (the Scandinavians).[11]

One may also wonder about the logical relation between ontological and methodological naturalism. It is tempting to assume that methodological naturalism implies ontological naturalism.[12] For one might argue that it wouldn't make sense to aim at emulating the methods of

[11] Neither the Scandinavians nor the Americans address the question of whether there might be kinds of psychological or sociological research that are *not* acceptable from the standpoint of naturalism.

[12] This appears to be the view of Wagner & Warner (1993, 12). I shall leave it an open question whether ontological naturalism implies methodological naturalism.

inquiry and styles of explanation employed in the sciences, unless one also believed that the world is such that this approach is likely to be successful, that is, that everything that exists is composed of natural entities, and that these entities determine all the properties of that which exists. Nevertheless, I am inclined to think that a believer in methodological naturalism may be *agnostic* about the ontological question, in the sense that he may allow that there may or may not be non-natural entities, such as a God, provided that these entities are unable to causally interact with the natural world – if there were a God, who could causally interact with the natural world, we couldn't really *know* that metal expands when heated, say, since the God might then choose to stop a heated piece of metal from expanding.[13]

At any rate, Leiter also distinguishes a third main type of naturalism, which I shall refer to as *semantic* naturalism, according to which a concept must be analyzable "in terms that admit of empirical inquiry," if the analysis is to be philosophically suitable. Leiter calls it semantic S-naturalism, because he conceives of it as a special kind of substantive naturalism. Here is Leiter:

> S-naturalism in philosophy is either the (ontological) view that the only things that exist are *natural* or *physical* things; or the (semantic) view that a suitable philosophical analysis of any concept must show it to be amenable to empirical inquiry. […] In the semantic sense, S-naturalism is just the view that predicates must be analyzable in terms that admit of empirical inquiry: so, e.g., a semantic S-naturalist might claim that "morally good" can be analyzed in terms of characteristics like "maximizing human well-being" that admit of empirical inquiry by psychology and physiology (assuming that well-being is a complex psycho-physical state). (2002, 3).

I believe, however, that we should make a distinction between a narrow and a broad conception of semantic naturalism.[14] On the narrow conception (NCSN), which Leiter appears to accept, a philosophically acceptable analysis of a concept entails that the concept – strictly speaking, the *term* that expresses the concept – refers to natural entities. On the

[13] This is also Leiter's view (Leiter 2007, 35, n 96). I want to thank Folke Tersman as well as Brian Bix and Michael Green for having emphasized in conversation and in email correspondence the possibility of a believer in methodological naturalism who is agnostic about the ontological question.

[14] Jan Österberg suggested to me that this (or a similar) distinction might be useful here.

broad conception (BCSN), on the other hand, a philosophically acceptable analysis of a concept entails that it does *not* refer to non-natural entities. This distinction is of some interest in this context, because the non-cognitivist analysis embraced by Ross and Olivecrona – according to which moral terms like 'right,' 'good,' or 'duty' have no cognitive (or descriptive) meaning, and *do not refer at all*[15] – is in keeping with the broad, but not the narrow, conception. For, on this type of analysis, while such terms do not refer to non-natural entities, they do not refer to natural entities either.

However, the broad conception of semantic naturalism is difficult to square with what we might call the *classical conception of philosophical analysis*, according to which such analysis aims to establish an analytically true equivalence between the *analysandum* (what is analyzed) and the *analysans* (what does the analyzing).[16] Since on the non-cognitivist analysis, moral terms have no cognitive meaning and do not refer at all, one cannot specify the analysans by saying "*A* has a right to *X* if, and only if, …" or "*A* ought to do *X* if, and only if, …" Accordingly, a naturalist who embraces the classical conception of philosophical analysis will almost certainly prefer the narrow conception of semantic naturalism.

Although Leiter does not touch on this issue either, it seems to me that semantic naturalism does *not* imply ontological naturalism.[17] Like the methodological naturalist, the semantic naturalist may allow that there may or may not be non-natural entities, provided that these entities are unable to causally interact with the natural world. For the belief that a philosophically acceptable analysis of a concept will be in terms of natural entities (NCSN), or at least not in terms of non-natural entities (BCSN), is clearly compatible with the belief that there may be non-natural entities that cannot influence the natural entities.

Let us note, finally, that Leiter makes a further distinction between two types of naturalism, which turns on one's view of the *goal* of the philosophical enterprise, viz. between *replacement* naturalism and *normative* naturalism: Whereas replacement naturalists aim to substitute a descriptive/explanatory account of some legal phenomena for existing

[15] Instead of cognitive meaning, they may have *emotive* meaning. On this, see Stevenson (1937).

[16] On the classical conception of philosophical analysis, see, e.g., Langford (1942); Urmson (1956, 116–8); Sosa (1983); Strawson (1992, ch. 2); Anderson (1993).

[17] I shall leave it an open question whether ontological naturalism implies semantic naturalism.

normative theories of such phenomena, normative naturalist aim instead to regulate practice by laying down norms and standards (2002, 35). Replacement naturalism is of interest in this context, because both the Americans and the Scandinavians Lundstedt and Ross aimed precisely to substitute a descriptive/explanatory account of some legal phenomena for existing normative theories of such phenomena.

3 Naturalism in the Legal Philosophy of Alf Ross

3.1 Introduction

Ross conceives of philosophy as "the logic of science" and its subject as "the language of science," and he thinks, in keeping with this, of jurisprudence as the logic of legal science (*Rechtswissenschaft*) and its subject as the language of legal science. The focus on the language of legal science involves in turn a large dose of conceptual analysis aimed at general and fundamental legal concepts, such as the concept of valid law, the concept of a legal rule, or the concept of a legal right. Ross puts it as follows:

> The relation of jurisprudence to the study of law is reflex, turning towards its logical apparatus, in particular the apparatus of concepts, with a view to making it the object of a more detailed logical analysis than is given to it in the various specialized studies of law themselves. […] His subject is pre-eminently the fundamental concepts of general scope such as, for example, the concept of valid law, which for that reason is not assigned to any of the many specialists within the wide realm of the law. (1959, 25–6. Footnote omitted.)

In fact, Ross espoused semantic naturalism already in Ross (1946), whose aim was to refute (what Ross referred to as) *dualism* in jurisprudence:

> The starting point of the exposition in the present book is the view that the fundamental source of error in a number of apparently unconquerable contradictions in the modern theory of law is a dualism in the implied prescientific concept of law which more or less consciously forms the basis of the theories developed. It is the dualism of reality and validity in law, which again works itself out in a series of antinomies in legal theory. What is meant by this dualism will appear from the sequel. As a preliminary explanation it may be said that law is conceived at the same time as an observable

> phenomenon in the world of facts, and as a binding norm in the world of morals or values, at the same time as physical and metaphysical, as empirical and a priori, as real and ideal, as something that exists and something that is valid, as a phenomenon and as a proposition. (Ibid., 11)

The reason why Ross could not accept dualism was that he could not square it with the ontological naturalism that he espoused. That is to say, he could not find a place for the ideal component of dualism – the bindingness, the a priori, the ideal, the validity – in the all-encompassing spatio-temporal framework, mentioned above.

Ross returned to the distinction between jurisprudential idealism and jurisprudential realism in *On Law and Justice*, where he made it clear that he espoused ontological, semantic, and methodological naturalism. He explained that jurisprudential *idealism* rests on the assumption that there are two distinct worlds with two corresponding modes of cognition, viz. (i) the world of time and space, which comprises the usual physical and psychological entities that we apprehend with the help of our senses, and (ii) the "world of ideas or validity", which comprises "various sets of absolutely valid normative ideas" and is apprehended by our reason (1959, 65); and that jurisprudential *realism* is concerned with the world of time and space, and aims to attain knowledge of the law using the methods of modern empiricist science. As he put it, "[t]here is only one world and one cognition. All science is ultimately concerned with the same body of facts, and all scientific statements about reality—that is, those which are not purely logical-mathematical—are subject to experimental test." (Ibid., 67)

He also made a distinction between *psychological* and *behaviorist* versions of jurisprudential realism, explaining that while all versions of realism interpret legal validity in terms of the *social efficacy* of legal norms, psychological realism and behaviorist realism differ on their understanding of the idea of social efficacy of norms. According to the former, a norm is valid "if it is accepted by popular legal consciousness"; according to the latter, it is valid "if there are sufficient grounds to assume that it will be accepted by the courts as a basis for their decisions." (Ibid., 71–3.

Ross's naturalism is at work, *inter alia*, in the analyses of the concepts of valid law and legal right, and in the analysis of the methods and techniques of legal reasoning. But, as we shall see, whereas it is the *narrow*, not the broad, conception of semantic naturalism that is at work in these analyses, it is the *broad*, not the narrow, conception of semantic natural-

ism that can be squared with Ross's non-cognitivism. Let us therefore take a look at Ross's meta-ethics before we turn to a consideration of these topics.

3.2 Ross's Meta-Ethics

Naturalists may be moral realists as well as moral anti-realists, though if they are moral realists they must of course embrace a naturalist version of moral realism. Ross was a moral anti-realist, specifically, a non-cognitivist of the emotivist type, who held that moral judgments do not state that something is the case, but express the speaker's attitudes or feelings. Since non-cognitivism does not assert or presuppose the existence of any moral facts whatsoever, it is clearly in keeping with the broad, but not with the narrow, conception of semantic naturalism.

Ross's non-cognitivism was explicitly stated in a couple of early articles. For example, in a 1936 article celebrating the 25th anniversary of the Pure Theory of Law, he maintains that we cannot conceive of the law as a system of norms in the sense contemplated by Kelsen and others, because norms do not express propositions, do not concern (or refer to) states of affairs, but simply express the speaker's (subjective) attitudes or feelings:

> Thus a normative claim does not have any meaning that can be expressed in abstraction from the reality of experience. It is not a "thought" the truth or falseness of which can be tested as something that is absolutely independent of its psychological experience. No, a normative claim can only be considered in its actual occurrence itself as a psychophysical phenomenon that brings certain other psychophysical phenomena (emotions, attitudes) to expression. But this "bringing to expression" has nothing to do with meaning, but only means that a normative claim is considered a fact in a real causal relationship to other, not immediately observable psychophysical phenomena, the existence of which we can infer in this way. (1936, 13)[18]

[18] Translated into English by Robert Carroll. The Danish original reads as follows. "Det normative Udsagn besidder alltsaa netop ingen Mening, der lader sig fremstille i Abstraktion fra den psykologiske Oplevelsevirkelighed. Det er ingen "Tanke," hvis Sandhed eller Falskhed kan pröves som noget, der er absolut uafhengigt af dens psykologiske Oplevelse. Nej, det normative Udsagn kan alene betragtes i sin faktiske Forekomst selv som et psykofysisk Faenomen, der bringer visse andre psykofysiske Faenomener (Fölelser, Indstillinger) til Udtryk. Men denne "Bringen til Udtryk" har intet med Mening at göre, men betyder blot, at det normative Udsagn betragtes som et faktum, der staar i faktisk Aar-

Ross does not have much to say about meta-ethical questions in *On Law and Justice*, but his distinction between assertions, which can be true or false, and directives, which lack truth-value (1959, 6–11), together with his comments on the idea of justice, suggest that he still adheres to the emotivist version of non-cognitivism. Having argued that whereas it makes sense to maintain that a decision by a court on the basis of a general rule is just or unjust, it does not make any sense at all to say that the rule itself is just or unjust, he states the following:

> To invoke justice is the same thing as banging on the table: an emotional expression which turns one's demand into an absolute postulate. That is no proper way to mutual understanding. It is impossible to have a rational discussion with a man who mobilises "justice," because he says nothing that can be argued for or against. His words are persuasion, not argument … The ideology of justice is a militant attitude of a biological-emotional kind, to which one incites oneself from the implacable and blind defence of certain interests. (Ibid., 274–5)

And a few pages later, discussing the relation between law and justice, he states the following: "To assert that a law is unjust is … nothing but an emotional expression of an unfavourable reaction to the law. To declare a law unjust contains no real characteristic, no reference to any criterion, no argumentation." (Ibid., 280)

Ross returns briefly to the question of the nature of moral judgments in his last monograph, *Directives and Norms*, where he makes it clear that he still accepts non-cognitivism of the emotivist type (1968, 64–8). Pointing out that cognitivism and non-cognitivism are the two main positions in moral philosophy, he explains that according to non-cognitivism, (i) acceptance of a directive constitutes its validity, (ii) there exists no specific moral cognition, and (iii) that the personal attitude involved need not be a matter of an arbitrary whim. He adds (iv) that non-cognitivism does not eliminate the need for moral reasoning by requiring that

sagssammenhang med andre, ikke umiddelbart iakttagelige psyko-fysiske Faenomener, til hvis Eksistens man ad denne Vej kan slutte sig."

Ross reiterates the claim that moral judgments do not state that something is the case, but simply express the speaker's attitudes or feelings, in an article that deals with the possibility of a logic of norms (1941, 55), and again in an article on the logical nature of value judgments (1945, 202–3).

every moral judgment be based on a separate attitude, and (v) that non-cognitivism does not have any connection with moral nihilism or moral indifferentism (relativism).

3.3 The Concept of Valid Law[19]

Ross observes in the beginning of *On Law and Justice* that the problem about the nature of law is at the heart of jurisprudence, and proceeds to ask why this is so. His answer to this reasonable question is that we need to be clear about the import of the concept of valid law, because we presuppose this concept every time we make a statement about the law of the land, such as "[Directive] D is valid (Illinois, California, common) law." (1959, 11) He adds that the interest of jurisprudents in the *nature* of their study-object is unique to the study of law and has no counterpart among, say, physicists or chemists, and explains why the problem about the nature of law is the main problem of jurisprudence. (Ibid., 11)

Turning to a preliminary analysis of the concept of valid law, Ross takes his starting point in an analysis of the game of *chess*. Pointing out that chess players move the chess pieces in accordance with a set of rules, he explains that one must adopt an *introspective* method if one wishes to ascertain which set of rules actually governs the game of chess – if one were content to observe behavioral regularities and nothing more, one would never be able to distinguish chess rules from regularities in behavior that depend on custom or the theory of the game (Ibid., 15). The problem, he explains, is to determine which rules are *felt to be binding*: "The first criterion is that they are in fact *effective* in the game and are outwardly visible as such. But in order to decide whether rules that are observed are more than just customary usage or motivated by technical reasons, it is necessary to ask the players by what rules they *feel themselves bound*." (Ibid., 15. Emphasis added) He maintains, in keeping with this, that a rule of chess is *valid* if, and only if, the chess players (i) follow the rule (ii) because they feel bound by it. (Ibid., 16)

He then points out that we must apply a similar method to the study of *law* and advances the following hypothesis:

[19] Like other Scandinavian and German authors, Ross speaks of 'valid law,' not just 'law,' in order to indicate that the law (in the sense of a legal system) is in force or exists. Roman law, for example, was, but is no longer, 'valid' law. I owe this point to Åke Frändberg.

> The concept "valid (Illinois, California, common) law" can be explained and defined in the same manner as the concept "valid (for any two persons) norm of chess." That is to say, "valid law" means the abstract set of normative ideas which serve as a scheme of interpretation for the phenomena of law in action, which again means that these norms are effectively followed, and followed because they are experienced and felt to be socially binding." (Ibid., 17–8)[20]

He is, however, careful to point out that this analysis is not as banal as one might think if one approached the problem with no preconceived notions. The novelty of the analysis is precisely its naturalist, anti-metaphysical quality, which rules out the traditional view that the validity of law is "… a pure concept of reason of divine origin existing *a priori* … in the rational nature of man". (Ibid., 18)

Turning to a full analysis of the concept of valid law, Ross points out that in regard to its *content*, a national legal system is a system of norms "for the establishment and functioning of the State machinery of force." (Ibid., 34) To say that such a system is *valid*, he explains, is to say that judges (i) apply the norms (ii) because they feel bound by them. (Ibid., 35) This analysis, he adds, is a synthesis of the psychological and the behaviorist versions of realism, distinguished above. (Ibid., 73–4)

The concept of valid law is thus analyzed in naturalistically acceptable terms, viz. in sociological and psychological terms. For not only does Ross take into account natural entities and nothing else (ontological naturalism), he also analyzes the concept in question in terms of such entities (the narrow conception of semantic naturalism), employing methods of inquiry and styles of explanation – claims about social facts that can be empirically verified or falsified – that are "continuous with" the sciences (methodological naturalism of the type that requires "methods continuity"). So, on this analysis, there is no non-naturalistic (idealistic) residue that could embarrass the naturalist.

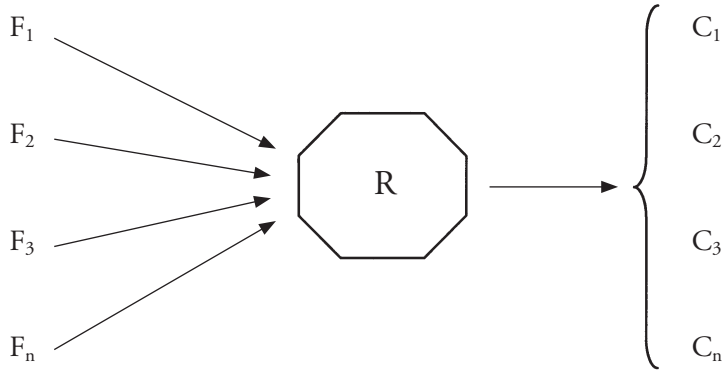
But, as we have seen, a non-cognitivist meta-ethics, according to which moral and legal terms have no cognitive meaning and do not refer, cannot be squared with the narrow conception of semantic naturalism, which requires that an acceptable analysis of a moral or legal concept

[20] But, one wonders, if we can't conceive of the law as a set of norms, on the ground that norms have no "meaning that can be expressed in abstraction from the reality of experience," as Ross contends, how can we conceive of valid law as a set of abstract normative ideas?

entails that the concept refers to natural entities. Does this mean that Ross *contradicts* himself when he clearly accepts the narrow conception of semantic naturalism and applies it to the analysis of legal concepts, such as the concept of valid law? I do not think so, and I will explain why below in my discussion of Ross's analysis of the concept of a legal right.

3.4 The Concept of a Legal Right

Ross's starting point is that the term 'legal right' does not refer – it lacks, as Ross puts it, semantic reference – and must therefore function in some other way (Ibid., 172–5. See also Ross (1957, 820). Against this background, Ross (1959, 74) claims that the concept of a legal right is a *technical tool of presentation*, or, as I shall say, a *connective concept*, which ties together a disjunction of operative facts and a conjunction of legal consequences in the following way (*F* stands for operative facts, *R* stands for right, and *C* stands for legal consequences):



We might say with Karl Olivecrona (1962, 190) that the concept of a legal right thus conceived fulfils the same function as a *junction*: a large number of lines (the operative facts) converge into the junction (the legal right), from which a large number of lines branch out (the legal consequences). On this analysis, to assert that a person has a legal right is to render the content of a number of legal norms in a convenient manner. What we have here, Ross explains, is "a simple example of reduction by reason to systematic order." (1959, 172)

Ross points out that his understanding of the concept of a legal right differs markedly from the common sense understanding of that concept, because lawyers as well as laymen often speak of legal rights as if they were some type of *entity* that follows from certain operative facts and then yields certain legal consequences (Ibid., 179). The problem with such a metaphysical conception of legal rights, he points out, is that it assumes that a legal right is "a single and undivided entity that must exist in a specific subject …" (Ibid., 179) For, he explains, it is often the case that the various functions (or aspects) of a legal right – such as the advantage of having a right, the power to take legal action, and the power to transfer the right – are to be found in different persons. (Ibid., 179–83)

Ross is aware that this kind of analysis, which emphasizes the connective function of the concept, fits other legal concepts as well, and he therefore proceeds to say something about the circumstances in which we can properly say that a person has a legal right (Ibid., 175). He is, however, careful to point out that doing this does not involve "deciding when a right 'actually exists.'" For, as he keeps reminding us, the term 'legal right' does not refer to "any phenomenon that exists under certain specific conditions." (Ibid., 175)

Nevertheless, Ross argues that typically the right-holder (i) is on the advantageous side of a legal relation, (ii) has the legal right as a result of a legal regulation, and (iii) is the person who can enforce the right by taking legal action. He adds that it is usually the case that the right-holder (iv) has the legal power to transfer the right to another person. The concept of a legal right, he concludes, "is typically used to indicate a situation in which the legal order has desired to assure to a person liberty and power to behave – within a specified sphere – as he chooses with a view to protecting his own interests." (Ibid., 177) He adds that this means that we do not speak of legal rights in a situation where a person has certain liberties and powers that are intended for the protection of social interests. (Ibid., 177) In such a case, he explains, we speak instead of a person's *authority* or *power*. The concept of a legal right, in other words, "indicates the autonomous self-assertion of the individual." (Ibid., 177)

Ross's attempt to distinguish the concept of a legal right from other concepts that might also be conceived of as connective concepts – by rather loosely characterizing the situations in which we typically say that a person has a legal right – is of interest in this context, because it doesn't indicate what is necessarily the case, but only what happens to be the case, and because the absence of conceptual necessity appears to be a

result of Ross's naturalist approach to conceptual analysis – in nature there is no conceptual necessity. (On this, see Bealer 1987)

Ross thus rejects the concept of a legal right as traditionally understood on the ground that the term 'legal right' does not refer to anything all. Since he believes that the concept thus conceived is unacceptable, Ross proposes that we re-conceive it as a connective concept along the lines indicated above. Thus re-conceived, the concept has been analyzed in terms of natural entities, viz. in terms of the content of valid, that is, existing legal norms, and this means that the analysis could be accepted by an adherent to the narrow conception of semantic naturalism. As Ross puts it, "the assertion that *A* possesses the ownership of a thing, when taken in its entirety, has semantic reference to the complex situation that there exists one of those facts which are said to establish ownership, and that *A* can obtain recovery, claim damages, etc." (1957, 822) Alternatively, one might say that the *content* of positive legal norms can be said to be an empirical matter, if and insofar as the *determination* of the content of such norms is essentially an empirical matter.[21]

One may, however, wonder whether this analysis can really be squared with Ross's non-cognitivism. If, on the non-cognitivist analysis, the term 'right' has no cognitive meaning and does not refer, how can 'right,' on Ross's analysis, refer to natural entities in the shape of the complex situation, mentioned in the previous paragraph? I believe Ross could answer this question by invoking a distinction between norms and first-order value judgments (the legal object-language), on the one hand, and statements *about* norms and second-order value judgments (the legal meta-language), on the other hand. Specifically, he might argue that the non-cognitivist theory applies *only* to the legal object-language, and that, while 'right,' as it occurs in the legal object-language, does not refer, his analysis concerns 'right' as it occurs in the legal meta-language. On this interpretation, Ross's analysis of the concept of a legal right simply does not come within the scope of the non-cognitivist theory. But this means, of course, that the scope of Ross's analysis turns out to be rather narrow, and this takes value away from the analysis.

[21] Of course, the extent to which this is so is a controversial question, which divides so-called exclusive and inclusive legal positivists. On this, see Coleman (2001, 103–19); Raz (1985); Waluchow (1994).

3.5 Methods and Techniques of Legal Reasoning

Ross's discussion of the methods and techniques of legal reasoning falls into two parts, viz. (i) the doctrine of the sources of law, which identifies the recognized sources of law, such as legislation, precedent, and custom, and (ii) the judicial method, which concerns the interpretation and application of the legal raw material found in the sources of law (Ross 1946, ch. 6; 1959, chs 3–4). Beginning with the former, Ross explains that if prediction of judicial decisions is to be possible, judges must embrace an ideology – a set of normative ideas – concerning how to decide cases,[22] and follow this ideology faithfully. And this ideology, he explains, is the subject-matter of the doctrine of the sources of law.

Ross is careful to point out that the doctrine of the sources of law concerns the way judges actually behave, and that any *normative* doctrine of the sources of law that deviates from the actual behavior of the judges will be of little or no value:

> The *ideology* of the sources of law is the ideology which in fact animates the courts, and the *doctrine* of the sources of law is the doctrine concerning the way in which the judges in fact behave. Starting from certain presuppositions it would be possible to evolve directives concerning how the judges *ought* to proceed in making their choice of the norms of conduct on which they base their decisions. But it is clear that unless they are identical with those which are in fact followed by the courts, such directives are valueless as bases for *predictions* as to the future behaviour of the judges, and thus for the determination of what constitutes valid law. Any such normative doctrine of the sources of law, which does not square with facts, is nonsensical if it pretends to be anything else than a project for a different and better state of law. The doctrine of the sources of law, like any other doctrine concerning valid law, is norm-descriptive, not norm-expressive—a doctrine concerning norms, not of norms. (1959, 76. Emphasis added)

Ross's treatment of the *judicial method* follows similar lines. Pointing out that we may regard statements about the interpretation of legal rules as statements about "valid interpretation" analogously to statements about valid law, Ross explains that this means that we must conceive of them as *predictions* of judicial behavior: "Just like the doctrine of the sources of law, a doctrine of method which is intended to serve as a guide to

[22] But note that such an ideology would have to include components that rightly belong in the theory of the judicial method, which Ross conceives of as a separate field of study.

interpretation must be a doctrine concerning the manner in which the courts in fact behave in the application of valid law in specific situations." (Ibid., 110) But he points out that we cannot expect as much precision in our claims about the judicial method as in the case of our claims about the doctrine of the sources of law.

Ross concludes his analysis by emphasizing that he has offered an *analytical-descriptive*, not a normative, theory of interpretation:

> Like the traditional doctrine of the sources of law, the traditional theory of method is constructed not as an analytical-descriptive theory expounding how law *is* administered (particularly: interpreted), but as a dogmatic-normative doctrine stating how the law ought to be administered (interpreted). These dogmatic postulates are developed by deduction from preconceived ideas of "the concept of law," "the nature of law," and "the task of the administration of justice", and are formulated in the guise of assertions as to the "aim" or "purpose" of interpretation. From these postulates are deduced, in turn, a series of general principles of interpretation or more concrete rules of interpretation. In general, these constructions have no value for the understanding of valid law or for the prediction of future legal decisions, unless they reflect, more or less by accident, the method which is actually practiced in the courts; their relative truth-value is limited because they attempt to lump the various considerations that affect interpretation into one single "purpose." (Ibid., 155)

I believe Ross's discussion of the doctrine of the sources of law and the judicial method is based on a commitment to both methodological and semantic naturalism, because in both cases the idea is to analyze a concept in terms of natural entities, and to make statements about the law that can be tested empirically; and the latter enterprise is precisely to emulate the methods of inquiry and styles of explanation employed in the sciences. Moreover, Ross's (implicit) claim that in both cases this type of analysis should be substituted for the traditional, normative approach to the doctrine of the sources of law suggests that Ross was also committed to replacement naturalism.

Finally, it is worth noting that in his analysis of the doctrine of the sources of law and the judicial method, Ross clearly assumes that judges decide cases in accordance with the *law* and not on the basis of party affiliation, bribes, racist preferences, etc. But this is not the case everywhere and at all times.[23] Consider, for example, the courts of law in the Third

[23] I owe this point to Thomas Mautner.

Reich. I believe this seemingly banal point is worth making, because one could argue that someone who aims for an empirical investigation into the causes of judicial decisions should not disregard "external" or "non-legal" influences on judges, since in some cases they – and not the law – may be the causes of the decision.

3.6 Conclusion

We have seen that Ross was a dyed-in-the-wool naturalist, who accepted semantic and ontological naturalism as well as methodological naturalism of the type that requires "methods continuity", and that his commitment to these types of naturalism played an important role in his legal philosophy. We have also seen that Ross's non-cognitivism is compatible with a commitment to the broad conception, but not with a commitment to the narrow conception, of semantic naturalism, which Ross appears to accept, though we have also seen that Ross might be able to solve the problem by invoking a distinction between the legal object language and the legal meta-language and saying that his analysis concerns legal concepts as they occur in the legal meta-language. Moreover, we have seen that Ross's analysis of fundamental legal concepts, such as the concept of valid law and the concept of a legal right, depends on a commitment to the narrow conception of semantic naturalism, and in the former case, also on a commitment to methodological naturalism; and that Ross's analysis of the methods and techniques of legal reasoning depends on a commitment to the narrow conception of semantic naturalism and to methodological naturalism of the type mentioned. Moreover, his analysis of the methods and techniques of legal reasoning may perhaps be seen as reflecting a commitment to replacement naturalism.

4 Naturalism in the Legal Philosophy of Karl Olivecrona

4.1 Introduction

I believe that Olivecrona was committed to ontological, but not to semantic, naturalism. Moreover, he does not seem to have accepted methodological naturalism.

Olivecrona's adherence to ontological naturalism is clear from the claim in the First Edition of *Law as Fact* that any adequate theory of law

must eschew metaphysics and treat the law as a matter of *social facts*. The aim, Olivecrona explained, was to *reduce* our picture of the law in order to make it correspond with *objective reality*:

> I want to go straight to this question [of law as fact] and treat directly the facts of social life. If in this way we get a coherent explanation, without contradictions, of those facts which are covered by the expression "law", our task is fulfilled. Anyone who asserts that there is something more in the law, something of another order of things than "mere" facts, will have to take on himself the burden of proof. […] The facts which will be treated here are plain to everybody's eyes. What I want to do is chiefly to treat the facts as facts. My purpose is to reduce our picture of the law in order to make it tally with existing objective reality, rather than to introduce new material about the law. It is of the first importance to place the most elementary and well-known facts about the law in their proper context without letting the metaphysical conceptions creep in time and again. (1939, 25–7)

That Olivecrona's commitment to and understanding of naturalism remained the same in all essentials throughout his long career is clear from his treatment of the various legal-philosophical problems that he engaged with, but also from what he said on the few occasions when he explicitly considered his methodological stance. For example, he explained in the preface to the Second Edition of *Law as Fact*, that even though it is not a second edition in the usual sense, but rather a new book, the fundamental ideas are the same, viz. "to fit the complex phenomena covered by the word law into the spatio-temporal world." (1971, vii. See also 1951.)

Olivecrona's naturalism comes to the fore, *inter alia*, in the critique of the view that the law has binding force, and in the analysis of the concept of a legal rule. Let us, however, begin with a look at Olivecrona's meta-ethics before we proceed to consider what Olivecrona has to say on these topics.

4.2 Olivecrona's Meta-Ethics

Olivecrona never spoke of *moral* values or moral rights or obligations, as distinguished from other types of value, right, or obligation, but preferred to speak more generally of values, rights, or obligations, etc. Nevertheless, it is clear from the context that he usually had in mind precisely moral values, rights or obligations. He rarely went further than to assert that there are no objective values and no objective ought, however. But

this claim, or these claims, could be accepted not only by non-cognitivists, but by meta-ethical relativists (Harman 1996) and error-theorists (Mackie 1977; Joyce 2001). As a result, the precise nature of Olivecrona's meta-ethical position is somewhat unclear. I suggest, however, that in his early writings Olivecrona vacillated between an error-theory and a non-cognitivist theory in regard to rights statements, while accepting non-cognitivism in regard to judgments about duty and value judgments proper, and that in his later writings he embraced a non-cognitivist theory across the board.[24] Of course, what is important here are not the details of Olivecrona's meta-ethical position, but that it is consistent with the types of naturalism espoused by Olivecrona.

Olivecrona's analysis of the *concept of a legal rule* in the First Edition of *Law as Fact* suggests a non-cognitivist stance. Olivecrona, who conceives of legal rules as a species of imperatives, viz. so-called independent imperatives, maintains that an independent imperative can sometimes be expressed by a sentence in the indicative mood, such as "It is the case that you shall not steal." And, he points out, this is the reason why we believe in objective values and an objective ought. But, he explains,

> [w]e do not impart knowledge by such utterances, we create suggestion in order to influence the mentality and the actions of other people. There is no real judgment behind the sentences. The objective nature of an action is not determined by saying that it should, or should not, be undertaken. What lies behind the sentences is something other than a judgment. It is that, in our mind, an imperative expression is coupled to the idea of an action. This is a psychological connection only, though of the utmost importance in social life. But for certain reasons the connexion appears to us as existing objectively. Thus we get an illusion of a reality outside the natural world, a reality expressed by this "shall". That is the basis of the idea of the binding force of the law. (1939, 46.)

[24] Konrad Marc-Wogau argued already in 1940 that Olivecrona vacillates between two different ways of understanding the existence of rights, duties, and the binding force of law. On the first interpretation, these entities exist only as ideas or conceptions in human minds. As Marc-Wogau puts it, on this interpretation they have *subjective*, but not objective, existence. On the second interpretation, the entities exist neither in reality nor as ideas or conceptions in human minds. On this interpretation, they have neither objective nor subjective existence. Marc-Wogau suggests that Olivecrona really wanted to defend the second interpretation, although he frequently spoke as if he were concerned with the first. Marc-Wogau (1940).

Olivecrona's analysis of the *concept of a right* in the First Edition of *Law as Fact*, on the other hand, suggests an error-theoretical analysis. Olivecrona argues that since we have seen that the idea of the binding force of the law is an illusion, we must conclude that the idea of duties is subjective. Duty, he explains, "has no place in the actual world, but only in the imagination of men." (Ibid., 75.) He then maintains that the situation is essentially the same with regard to the concept of a right:

> It is generally supposed that the so-called rights are objective entities. We talk about them almost as if they were objects in the outer world. On reflection we do not, of course, maintain that this is the case. But we firmly believe that the rights exist outside our imagination as objective realities, though they are necessarily something intangible. We certainly do not confine their existence to the world of imagination. Suggestions to that effect are commonly rejected with scorn and indignation. Yet on close examination it is revealed that the rights just as well as their counterpart the duties exist only as conceptions in human minds. (Ibid., 76–7)

I take Olivecrona to be saying that while statements about rights or duties are genuine statements that assert, or perhaps imply, that rights and duties exist "outside our imagination as objective realities," the truth of the matter is that they exist only as *conceptions in the human mind*, and that therefore all statements about rights or duties are false.[25]

Olivecrona returns to the topic of legal rules and judgments about duty in an article on realism and idealism in legal philosophy published 1951. Having reiterated a claim made in the First Edition of *Law as Fact*, viz. that the grammatical form of value judgments, which here appears to include rights statements as well as judgments about duty, but *not* value judgments proper, deceives us into believing in objective values and an objective ought, he proceeds to clarify the real nature of value judgments:

> These statements have the *verbal form* of judgments; that is to say, they are verbal propositions concerning reality. When we, for instance, qualify actions as good or bad, we apparently ascribe the property of goodness or badness to them. Yet, it is obvious that no such property can be detected in the actions among their natural properties. The qualification represents our

[25] Strictly speaking, only statements that assert that there *are* rights or duties would be false on this interpretation, whereas statements that there are no rights or duties or statements that a certain, contemplated right or duty does not exist, would be true.

> own emotional attitude; it would be senseless to describe an action as either good or bad if it were to leave us completely unmoved. The statements on goodness or badness are supplied with meaning by the corresponding feelings. But our feelings are entirely subjective; it is senseless to ask whether they are true or not. They exist, or do not exist: that is all. (1951, 129–30. Footnote omitted.)

The reference to what "we apparently ascribe" to actions and to "our emotional attitude," and the claim that it is senseless to ask whether our feelings are true or not, suggest that Olivecrona now embraces non-cognitivism of the emotivist type.

Olivecrona returns to the concept of a *right* in the Second Edition of *Law as Fact*, where he makes a distinction between two different ways of rejecting the reality of rights. He explains that we may say that there is no *facultas moralis* of natural law theory or no *Willensmacht* of the imperative theory of law, or we may instead say that the noun 'right' as commonly used "does not signify anything at all," not even something that exists in imagination only. (1971, 183) He is explicit that he now prefers the second, non-cognitivist analysis, though he does not comment on the fact that he used to prefer the first, error-theoretical analysis.

Details about Olivecrona's meta-ethical position aside, it is clear that Olivecrona's non-cognitivism is in keeping with a commitment to ontological naturalism: Since there are no such entities in the natural world as moral values or standards, one's meta-ethical theory must do without them. And since non-cognitivism does not assert or imply the existence of any moral facts whatsoever, it is also in keeping with the broad conception of semantic naturalism, which, as we have seen, has it that a philosophically acceptable analysis of a concept entails that it does *not* refer to non-natural entities.

4.3 The Binding Force of the Law

Olivecrona begins the First Edition of *Law as Fact* with a consideration and rejection of the view that the law has binding force. He introduces the topic to be discussed in the following way:

> The most general definition of law seems to be that law is a body of rules, *binding* on the members of the community. Vague as it is, we may take this as our starting point for our investigation into the true nature of the law. It contains at least one element which, beyond doubt, is common to practically all those who have treated the subject. This is the assumption that the

> law is *binding*. Leaving aside for the time being the question how a rule is to be defined, we will first ask what is meant by the binding force of the law and try to decide whether the binding force is a reality or not. (1939, 9).

Having rejected several attempts to explain the nature of the binding force by reference to social facts, such as feelings of being bound, or inability to break the law with impunity, Olivecrona concludes that the binding force has no place in the world of time and space, but must be located in some sort of supernatural realm: "The absolute binding force of the law eludes every attempt to give it a place in the social context. […] This means in the last instance that the law does not belong to the world of time and space. It must have a realm of its own, outside the actual world." (Ibid., 14) But, he objects, this is absurd. The law could not be located in a supernatural world beyond the world of time and space, because there could be no *connection* between such a world and the world of time and space:

> There is one very simple reason why a law outside the natural world is inconceivable. The law must necessarily be put in some relation to phenomena in this world. But nothing can be put in any relation to phenomena in the world of time and space without itself belonging to time and space. Therefore all the talk of a law, which in some mysterious way stands above the facts of life, is self-contradictory. It makes no sense at all. (Ibid., 15–6)[26]

As Olivecrona sees it, we have here the dividing-line between realism and metaphysics, between scientific method and mysticism in the explanation of the law. To believe that the law has binding force and that therefore the law belongs in a supernatural world is to give up any attempt at a scientific explanation of the law and legal phenomena and to indulge in metaphysics (Ibid., 17).

Olivecrona does not, however, explain *why* there can be no connection between the world of the ought and the world of time and space; he just asserts that there can be no such connection. But, even though he does not say so, his critique owes a lot to Hägerström's critique of Hans Kelsen's theory of law, put forward in a 1928 review of Kelsen's *Hauptprobleme der Staatsrechtslehre* (Hägerström 1953, ch. 4). Hägerström argued that the very idea of the world of the ought is absurd, because this world cannot be *thought of* as even existing alongside the world of time

[26] Olivecrona adds that as a matter of fact the law *is* part of the world of time and space, and that therefore it cannot also be part of some supernatural world. Ibid., 16–7.

and space. For, he reasoned, no *knowledge* of any reality is possible, except through relating its object to a systematically interconnected whole, and the fact that the two worlds – the world of the ought and the world of time and space – are different in kind means that they cannot be coordinated in a systematically interconnected whole. As he puts it, "so far as I contemplate the one [world], the other [world] does not exist for me." (Ibid., 267). Note, however, that whereas Olivecrona appears to be concerned with the *existence* of the world of the ought, Hägerström is clearly concerned with *knowledge* about the world of the ought.

Olivecrona then turns to consider Kelsen's theory of law, because he believes that Kelsen's theory illustrates the necessity for believers in the binding force of the law, to make a distinction between the world of the law and the world of time and space (1939, 17–8). He seizes on the fact that on Kelsen's analysis, there is a connection between operative facts and legal consequence in legal norms that is as *unshakable* as the connection between cause and effect in nature. And this connection, he continues is such that the legal consequence *ought* to ensue when the operative facts are at hand. He states the following:

> A legal rule, according to Kelsen, has a peculiar effect in that it puts together two facts, e.g. a crime and its punishment, in a connexion which is different from that of cause and effect. The connexion is so described that the one fact ought to follow upon the other though it does not necessarily do so in actual fact. The punishment ought to follow the crime, though it does not always follow. Now this "ought" is not, in Kelsen's theory, a mere expression in the law or jurisprudence. It signifies an *objective connexion* that has been established by the law. (Ibid., 18. Emphasis added)

But, Olivecrona objects, it is simply impossible to explain in a rational way how facts in the world of time and space, such as the activity of the legislature, can produce effects in the world of the ought. As he puts it, "[a]t one time Kelsen bluntly declared that this is 'the Great Mystery.' That is to state the matter plainly. A mystery it is and a mystery it will remain forever." (Ibid., 21)

As should be clear from Olivecrona's discussion of Kelsen's theory, the binding force, as Kelsen and Olivecrona understand it, is strictly non-moral and amounts to the idea that valid legal norms (or rules) apply and establish legal relations independently of what anyone may do or think about it. If, for example, there is a legal rule that provides that when declaring one's income to the internal revenue service, one may

deduct costs for traveling to and from one's workplace, then one is legally permitted to do so, no matter what one may do or think about it; and if there is a legal rule, according to which the buyer of a good must pay the seller when the seller demands payment, then the buyer has a legal duty to do so, no matter what he may do or think about it; and so on. In other words, the binding force is not in any sense a right-making property of legal rules. This means that Olivecrona's critique of the view that the law has binding force applies to our common-sense understanding of the law. Hence you cannot escape the critique by saying that you are just a simple lawyer dealing with mundane, everyday legal problems, and that you don't believe in metaphysical and mysterious notions like the binding force of the law.

Note that Kelsen's analysis, as Olivecrona (and Kelsen himself) understand it, amounts to a *non-naturalist* understanding of legal norms. As Kelsen puts it, "[t]o speak … of the 'validity' of a norm is to express first of all simply the specific existence of the norm, the particular way in which the norm is given, in contradistinction to natural reality, existing in space and time. The norm as such, not to be confused with the act by means of which the norm is issued, does not exist in space and time, for it is not a fact of nature." (1992, 12). And again: "One will not be able to deny …that the law *qua* norm is an ideal reality, not a natural reality." (Ibid., 15)[27] And this is precisely what Olivecrona has in mind when he speaks about an "objective connexion" in the quotation above. As far as I can tell, Olivecrona never contemplated any other version of realism about legal norms than Kelsen's non-naturalism.

Now Olivecrona maintains, in keeping with his belief that there is no such thing as binding force, no unshakable connection between operative facts and legal consequence, that there is *no legal effect to be found*,

[27] See also Kelsen 1945, 45–6. Kelsen speaks about the 'specific existence' of norms in the Second Edition of *Reine Rechtslehre*, too, though he is more cautious here and, as far as I can see, is never explicit that norms do not exist in time and space. Kelsen (1960, 5–6, 9–10). Note that Kelsen combines realism about legal norms with anti-realism, specifically meta-ethical relativism, about moral norms. Kelsen (1945, 6–8).

that there is only the psychological fact that people tend to *believe* that there is a legal effect, and, of course, the (sociological) fact that they tend to *act* accordingly. For example, when a clergyman has declared a man and a woman to be married, the citizens as well as judges and other legal officials tend to believe that a change of legal positions has occurred, and they tend to act accordingly. But, he points out, we need not assume the existence of a special legal effect in order to explain these facts, because "[w]e are all conditioned to respond to the act in certain ways, and we do it." (1971, 225)

But if legal rules do not establish legal relations, what do they do? Olivecrona clearly needs to conceive of the function of legal rules in some other way than Kelsen and others do. And, as we shall see, his view is that legal rules are *psychologically effective*, and that in this way they are part of (what he calls) the chain of cause and effect.

We see, then, thar Olovecrona's critique of the view that the law has binding force is premised on a commitment to ontological naturalism: Since Olivecrona is an ontological naturalist, he cannot accept the existence of a world, viz. the world of the ought, located beyond the world of time and space. Moreover, since he is *not* a semantic naturalist (in any sense), he can espouse an error-theoretical *analysis* of the concept of a binding force, while rejecting the *concept* of binding force itself on the ground that does not refer to natural entities.

4.4 Legal Rules as Independent Imperatives

The *content* of a legal rule, Olivecrona explains, is an idea of an imaginary action by a judge in an imaginary situation (1939, 28–9). The *form* of a legal rule, he continues, is *imperative*, because the lawmakers do not aim to inform us about the existence of certain ideas in their minds, but to impress a certain behavior on us (Ibid., 31). He is, however, careful to point out that he does not have the *grammatical* imperative form in mind when he maintains that legal rules have imperative form. Statutory provisions are often phrased in the indicative or the subjunctive mood, but they always express an imperative. (1942, 9)

Pointing out that the *command* is the prototype of the imperative, Olivecrona explains that a command works directly on the will of the recipient of the command, and that this means that it must have a *suggestive character*. He states the following:

> A command is an act through which one person seeks to influence the will of another. This may be done through words or signs or perhaps by a determined look only. It is characteristic of the command that the influence on the will is not attained through any appeal to things that constitute values for the receiver of the command. The command may be supported and strengthened by a threat or by a promise. But this is something secondary. The command as such does not contain any reference to values. *It works directly on the will*. In order to do this the act must have a *suggestive character*. Whether words or other means are used, the purpose is obviously suggestion. (1939, 33–4. Emphasis added.)

He maintains, more specifically, that if a command takes effect there arises in most cases in the addressee's mind a *value-neutral intention* to perform the commanded action, that is, an intention that is not motivated by the addressee's own wishes, and adds that in some cases a command may actually trigger an action without the addressee's having had any intervening value-neutral intention. (1942, 7, 10–1)

Olivecrona maintains, however, that legal rules are not commands, but (what he refers to as) *independent imperatives* (1939, 42–9). On his analysis, there are three important differences between commands and independent imperatives. Whereas a command is always (i) issued by a certain person, and (ii) addressed to a certain person or persons, an independent imperative is neither issued by anyone in particular, nor addressed to anyone in particular (Ibid., 32–41). Moreover, as we have already seen, (iii) whereas a command is in no way equivalent to a judgment about a certain normative state of affairs, *an independent imperative can sometimes be expressed by a sentence in the indicative mood,* such as "It is the case that you shall not steal"; and this means that we believe that we can have *knowledge* of what we ought to do (Ibid., 45–6). But, as we have also seen, Olivecrona objects to this view that there are no real judgments behind the sentences that (appear to) express such judgments, but only a *psychological connection*. What really goes on in the process of legislation, he explains, is that the legislature attempts to *influence human behavior* by making use of imperative expressions:

> The word "ought" and the like are imperative expressions which are used in order to impress a certain behaviour on people. It is sheer nonsense to say that they signify a reality. Their sole function is to *work on the minds of people*, directing them to do this or that or to refrain from something else – not to communicate knowledge about the state of things. By means of such

> expressions the lawgivers are able to influence the conduct of state officials and of the public in general. The laws are therefore links in the chain of cause and effect. (Ibid., 21–2. Emphasis added)

On Olivecrona's analysis, then, the effect of legislation, or more generally, legal rules, in society is a matter of *psychology* (Ibid., 52). He points out, however, that the way the individual mind works is a matter for the science of psychology, and that for the purposes of his investigation into the nature of law, he need only point to the general conditions that must be satisfied for legislation to be effective in society. (Ibid., 52)

He identifies, in keeping with this, two general conditions for the efficacy of legislation in society. First and most important, the citizens must display an *attitude of reverence toward the constitution*: "Everywhere there exists a set of ideas concerning the government of the country, ideas which are conceived as 'binding' and implicitly obeyed. According to them certain persons are appointed to wield supreme power as kings, ministers, or members of parliament etc. From this their actual power obtains." (Ibid., 52–3) This attitude is not self-supporting, however, but must be sustained by means of an incessant psychological pressure on the citizens (Ibid., 53–4). Hence a second condition for the efficacy of legislation in society must be satisfied, viz. that there be an *organization* that handles the application and enforcement of the law: "There must be a body of persons, ready to apply the laws, if necessary with force, since it would be clearly impossible to govern a community only by directly influencing the minds of the great masses through law-giving." (Ibid., 55–6)

One may, however, wonder how this organization, *A*, can become fully functional and give rise to the suggestive character of the rules in question, given that the rules that apply to the officials in *A* could not have the requisite suggestive character, unless there were another organization, *B*, whose officials applied and enforced those rules. And, of course, *B* could not explain the suggestive character of those rules, unless there were a third organization, *C*, whose officials applied and enforced the rules that apply to the officials in *B*. And so on, and so forth.

Olivecrona sticks to this analysis of the function of legal rules in the Second Edition of *Law as Fact*, except that he introduces the concept of a performatory imperative, in order to account for those legal rules that do not immediately concern human behavior (1971, chs 5, 8). He explains that a performatory imperative is an imperative whose meaning is that something shall be the case or come to pass, and points out that

the assumption among lawyers, judges, and legal scholars is that legal effects are brought about through such imperatives (Ibid., 133–4). He offers the example (from Roman law) of a young man who has been sold three times by his father, and who therefore, according to the law of the twelve tables, "shall be free from the father." This, he explains, is clearly an imperative, though it is addressed neither to the father nor to the son or to anyone else, but "is directed toward a change in the status of the son." (Ibid., 220)

Olivecrona's analysis of the concept of a legal rule reflects a commitment to ontological naturalism and to methodological naturalism of the type that requires "methods continuity" with the sciences. For the analysis locates legal rules in the world of time and space, and sees legal rules as psychologically effective, as parts of the chain of cause and effect, in a way that could – in principle – be empirically tested, although it is worth noting that Olivecrona himself never emphasized the "testability aspect" of his analysis.

4.5 Conclusion

We have seen that the critique of the view that the law has binding force and the analysis of the concept of a legal rule both illustrate Olivecrona's commitment to ontological naturalism. More specifically, the claim that there can be no such thing as a world or realm beyond the world of time and space, depends on a belief in ontological naturalism. Moreover, the view that the function of legal rules is to influence human behavior suggests a commitment to methodological naturalism.

5 Naturalism in the Legal Philosophy of Vilhelm Lundstedt

Vilhelm Lundstedt was not only a prominent tort law scholar and a social-democratic member of the Swedish parliament, he was also Olivecrona's senior colleague when Olivecrona was still affiliated with Uppsala University, and a jurisprudent in his own right. Following Axel Hägerström, he put forward a legal philosophy that was at least as radical as Olivecrona's. There can be no doubt, however, that on the whole his polemical style produced more heat than light, which is why I will devote much less space to Lundstedt's legal philosophy than to Olivecrona's.

Lundstedt expounded his mature legal philosophy in a book entitled *Legal Thinking Revised* (1956). Although he did not explicitly consider the nature of reality in this work, his commitment to the narrow conception of *semantic* naturalism and to *methodological* naturalism of the type that requires "methods continuity" with the sciences, is clear from his rejection of (what he referred to as) traditional legal science and his pronouncements on legal science conceived of as a real science. His main objection to traditional legal science was that it operates with metaphysical concepts such as 'right,' 'duty,' 'wrong-doing,' and 'guilt.' (Ibid., 42) He argued instead that legal science, conceived of as a real science, must be an empirical science, which deals with social facts: "As a science jurisprudence [that is, legal science] must be founded on experience, on observation of facts and actual connections, and consequently be a natural science." (Ibid., 126)[28] He added that legal science thus conceived would be concerned with "social evaluations and other psychological causal connections." (Ibid., 126) Recognizing that legal science thus conceived would be a rather inexact enterprise, he pointed out that it would not be in a worse position in this regard than many other sciences. (Ibid., 127)

He did, however, touch on the topic of *ontological* naturalism, somewhat to the reader's surprise, in an article from the early 1930's dealing with problems in international law. Here he argued, following Hägerström (see Section 4 above), that a belief in objective values and an objective ought presupposes a belief in the existence of two distinct worlds – the world of time and space and the world of the ought – and that such a belief is incoherent, because the two worlds simply cannot exist side by side:

> … this idea of a dual world is a necessary result of the belief in the existence of objective values, e.g., an objective "ought." As everything in the world existing in time and space is causally connected with other things, and consequently *is*, of necessity, like this or like that, it must be an insuperable contradiction to maintain that something *ought* objectively to be like this or like that. In order to be able to operate with an objective "ought," one must consequently remove in the imagination to a world *beyond* the "being," to a spiritual world, an ideal world, in which the connection in time and space does not raise any obstacles to the assumption of an objective "ought." By this manipulation, however, one gets entangled in new absurdities. For the

[28] Although Lundstedt speaks of 'natural' science, he clearly means 'social' science.

idea is, I take it, that the two worlds are to exist *contemporaneously side by side*. But, if so, the spiritual world itself must be determined with regard to time and space, and then again the logical possibility of operating with the "ought" is entirely eliminated.

If one assumes at all a world beyond the connection in time and space, the consequence must of necessity be that the physical world, existing in time and space, must disappear—as a result of this assumption. Otherwise the ideal world itself, as I have mentioned, must be determined with regard to time and space. In one's argument, whenever one wishes to have the slightest contact with the physical world, the latter therefore dominates entirely, and entirely eliminates every logical thought about the existence of an ideal world. (1932, 328–9)

I suppose Lundstedt means that the "insuperable contradiction" consists in the futility of demanding that something that *is* necessarily the case, *ought* to be otherwise. He may be right about this, but since he is clearly wrong to say that "everything in the world existing in time and space … *is*, of necessity, like this or that …", he has no basis for the further claim that anyone who believes that "something *ought* objectively to be like this or that" must rationally locate the objective ought in a supernatural world.

Like Ross and Olivecrona, Lundstedt was also a committed non-cognitivist, since he asserted that value judgments can neither be true nor false. The reason, he explained, is that value judgments depend in a peculiar way on the feelings of the person who makes them. He put it as follows:

> Judgments of value differ from proper judgments, because they are dependent on the feeling, in a positive or negative direction, in the person who makes the judgment. A purely theoretical examination, which—completely freed from all emotional influences—only established facts, could never lead to: that something ought to be done, that someone has brought guilt (or blame) upon himself, or that something was just. The conceptions 'ought', 'guilt', and 'justice' should in other words be completely incomprehensible to a person devoid of feelings—if such a being, a pure thinking machine, were to exist. This is inherent in the nature of the formulation that ought-, guilt- and justice judgments are subjective and therefore cannot be objective, i.e. cannot have any theoretical meaning, consequently can be neither true nor false. (1956, 45. See also 1942, 18-24.)[29]

[29] It is worth noting that Lundstedt's line of argumentation in this quotation corre-

As we have seen, Lundstedt also took an interest in questions of international law, especially the question of peace. He argued that international law – the law of nations – is based on metaphysical, even superstitious, notions, such as the ones considered above, and that as a result the world is a very dangerous place. He pointed out that while it is bad enough to assume that *individuals* have rights and duties, etc., this assumption is apt to lead to disaster when applied to *nations*. For, he explained, the idea that nations have rights and duties and can be guilty of wrongdoing that must be punished leads unavoidably to aggression and, in the last instance, to war (1932, 332–3). His idea, then, appears to have been that our use of metaphysical concepts has bad consequences. As Bjarup (2004, 184–5) has noted, Lundstedt's method of social welfare is similar to utilitarianism. But note that Lundstedt (1925, 24) emphatically denies that his method of social welfare is in any way related to the ethical theories of Jeremy Bentham and John Stuart Mill.

Indeed, on a more fundamental level, Lundstedt maintained that the above-mentioned metaphysical concepts are part and parcel of (what he referred to as) the common sense of justice, and that legal scholars ought to reject (what he referred to as) the *method of justice*, which is based precisely on the common sense of justice, and embrace instead (what he referred to as) the *method of social welfare*, according to which the aim of all legal activities – such as legislation and judicial decision-making, including statutory interpretation – is to benefit mankind.[30] He appears to have believed that the method of social welfare is in keeping with, and is perhaps even required by, his anti-metaphysical approach – his naturalism and his non-cognitivism – to the study and practice of law.

sponds very closely to Hägerström's analysis in Hägerström's inaugural lecture of 1911. See Hägerström (1964, 88–9).

[30] For an account of the method of social welfare, see Lundstedt (1956, 171–200).

6 Naturalism in the Legal Philosophy of the American Realists[31]

6.1 Introduction

Brian Leiter argues in a recent book that the American realists are best understood as philosophical naturalists. He notes in the introduction that philosophers, even those with an interest in the law, have on the whole paid little or no attention to the writings of the American realists, thinking they were philosophical dilettantes. In order to explain this, Leiter suggests that the Americans were really prescient naturalists, who were not – and could not be – appreciated by those working within the dominant jurisprudential tradition, according to which jurisprudence was a matter of conceptual analysis via appeal to folk intuitions (as expressed, *inter alia*, in ordinary language) (2007, 1–2).

Leiter explains that the Americans did not put forward a theory of law, but a theory of *adjudication*, while pointing out that it is a mistake to ascribe to them the Received View, according to which judges "exercise unfettered choice in picking a result," and "make this choice in light of personal or idiosyncratic tastes and values." (Ibid., 25) What they did assert, he explains, was the Core Claim, viz. that *judges respond primarily to the stimulus of the facts* – as distinguished from the applicable rule or rules – *of the case* (Ibid., 23). On this account, he explains, "Realists advance (1) a *descriptive* theory about the nature of judicial decision, according to which (2) judicial decisions fall into (sociologically) determined patterns, in which (3) judges reach results based on a (generally shared) response to the underlying facts of the case, which (4) they then rationalize after-the-fact with appropriate legal rules and reasons." (Ibid., 30)

According to Leiter, American realism thus conceived involves a commitment to (methodological) naturalism and to pragmatism. He explains that whereas (methodological) *naturalism* requires that philosophical theories be "continuous with" the sciences, and rejects the notion that there is such a thing as a first philosophy, that is, a philosophy that proceeds *a priori*, *pragmatism* requires that a satisfactory theory of adjudication for lawyers be able to predict the outcome of court cases. And, he points out, since one can reliably predict court decisions only if one knows what

[31] The first six paragraphs in this section can be found, more or less verbatim, in Spaak (2008).

causes courts to decide as they do, the latter theory (pragmatism) presupposes the former (naturalism) (Ibid., 30–1).

In regard to the issue of naturalism, Leiter sees an important analogy between Quine's well-known line of argumentation in "Epistemology Naturalized" (mentioned above in Section 1) and the line of argumentation adopted by the American realists in their critique of traditional theories of adjudication. He points out that Quine's argument for replacement naturalism proceeds in two steps – first, a critique of epistemological foundationalism à la Rudolf Carnap, and then replacement of such foundationalism with a descriptive/explanatory account of the evidence-theory relation – and argues that the Americans reasoned in a similar way concerning theories of adjudication.[32] First, they argued against adjudicative foundationalism by saying that under these theories, the class of legal reasons does not unequivocally determine an outcome in the case at bar, and then they argued in favor of replacement of such "sterile" (because indeterminate) theories by descriptive/explanatory accounts of adjudication. Leiter states the following:

> As Underhill Moore [an American Realist] puts it in the beginning of one of his articles: "This study lies within the province of jurisprudence. It also lies within the field of behavioristic psychology. It places the province within the field." Notice how this echoes Quine's idea that "Epistemology … simply falls into place as a chapter of psychology …" Jurisprudence—or, more precisely, the theory of adjudication—is "naturalized" because it falls into place, for the Realist, as a chapter of psychology (or anthropology or sociology). Moreover, it does so for essentially Quinean reasons: because the foundational account of adjudication is a failure—a consequence of accepting the Realists' famous claim that the law is indeterminate. (Ibid., 40. Footnotes omitted.)

So, on Leiter's analysis, the American realists were *methodological* naturalists who focused on the study of *adjudication*. But while this may be well true, it seems to me that some prominent realists, such as Oliver Wendell Holmes, Walter Wheeler Cook, and Felix Cohen, were also, even primarily, *semantic* naturalists who focused on the analysis of *fundamental legal concepts*. Let us take a brief look at what these authors had to say about naturalism in jurisprudence.

[32] I discuss the plausibility of Leiter's analogy in Spaak (2008).

6.2 Oliver Wendell Holmes

In his famous article "The Path of the Law," Holmes concerns himself with the *prediction* of what courts are likely to do, because he believes that ability to predict this is what counts from the standpoint of most people, good or bad, since they will want to avoid "coming up against what is so much stronger than themselves." (1896–97, 457) But to be able to predict what the courts will do, he explains, one needs to be clear about the limits of the law, and this in turn means that one must make a sharp distinction between law and morality, between legal rights and duties and moral rights and duties. He then proposes the following analysis of the concept of *law*: The law is nothing but the prophecies of what the courts will do in fact. He puts it as follows:

> Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law. (Ibid., 460–1)

Turning to the concept of a *legal duty*, he maintains that a legal duty is mainly the prophecy that if a person doesn't do what he is legally required to do, he will suffer disagreeable consequences:

> Take again a notion which as popularly understood is the widest conception which the law contains; – the notion of legal duty …We fill the word with all the content which we draw from morals. But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. (Ibid., 461)

I thus take it that Holmes is here concerned with the analysis of fundamental legal concepts, and I believe the approach to conceptual analysis that he advocates is in keeping with the approach advocated by the Scandinavians. Like them, he appears to endorse the narrow conception of *semantic* naturalism, in that he appears to believe that a philosophically acceptable analysis of a concept entails that the concept refers to natural

entities. He also appears to endorse *methodological* naturalism, because the predictive analysis seems designed to emulate the styles of explanation used in the sciences, viz. explanations in terms of cause (the existence of a legal rule) and effect (the judicial decision based on that legal rule). And although he doesn't say so, I suspect he also wishes to substitute the predictive analysis for traditional, normative analyses of legal concepts and institutions. And if this is so, he qualifies as a *replacement* naturalist, too.

We should note, however, that Brian Leiter points out that Holmes wasn't concerned with the *concept* of law, but with giving practical advice to lawyers (2007, 104–6). But while this may have been Holmes's main concern, I believe that Holmes was also concerned with the analysis of concepts,[33] albeit in a more relaxed way than those who aim to establish an analytically true equivalence between the *analysandum* and the *analysans* on the basis of an appeal to *a priori* intuitions. For Holmes certainly wanted to elucidate the concepts of law, right and duty.

In any case, the predictive analysis defended by Holmes has not been well received by most jurisprudents. For example, Olivecrona notes that in the case of the concepts of right and duty, this analysis may be understood either as an interpretation of these concepts as traditionally understood, or as a claim about what empirical facts we normally find in a situation where we say that a person has a right or a duty (1962, 159–60). And he finds faults with both ways of understanding the predictive analysis. The problem with the first alternative, he explains, is that the analysis simply cannot account for the concepts of right and duty as traditionally understood: "[i]f I make the assertion that I have a claim for damages against another person, I am not making a prediction as to what will happen if he does not liquidate the claim at once. I mean that I have a claim now, that he ought to comply with it, and that I am entitled to a favourable judgment by the court because I have a right." (Ibid., 158. See also Hart 1961, 10) The problem with the second alternative is, among other things, that it does not yield workable concepts, because there are too many conditions that must be satisfied for the analysis to yield the "right result." (1962, 159–60) Thus the gist of Olivecrona's critique, which I consider to be well founded, is that the predictive analysis does away with

[33] It is worth noting that Felix Cohen appears to have looked upon Holmes's analyses as analyses of concepts, in that he attributes to Holmes a functional definition of law. (1937, 13–5).

the *normative* aspect of the concepts in question, that it cannot account for the circumstance that judges and lawyers treat legal rules and rights and duties as *reasons for action*.

6.3 Walter Wheeler Cook

In an essay on the conflict of laws, Walter Wheeler Cook (1924, 457–9) points out that the experimental, or inductive, method – according to which scientists observe what goes on in the world, formulate hypotheses on the basis of their observations, and are prepared to adjust their hypotheses in light of later observations – has come to dominate the scene in the natural and the social sciences, and notes (to his satisfaction) that the same method has also been adopted in the field of law, not least in the conflict of laws. He explains that like natural scientists, lawyers study objective physical phenomena, though they do not, of course, focus on atoms, molecules, and planets, but on *human behavior*; and he argues that terms like 'law,' right,' and 'duty' must be analyzed in terms of human behavior, specifically the behavior of judges and other legal officials:

> As lawyers we are interested in knowing how certain officials of society—judges, legislators, and others—have behaved in the past, in order that we make a *prediction* of their probable behavior in the future. Our statements of the "law" of a given country are therefore "true" if they accurately and as simply as possible describe the past behavior and predict the future *behavior* of these societal agents. […] "Right," "duty," and other names for legal relations are therefore not names of objects or entities which have an existence apart from the behavior of the officials in question, but merely terms by means of which we describe to each other what *prophecies* we make as to the probable occurrence of a certain sequence of events—the *behavior* of officials. We must, therefore, constantly resist the tendency to which we are all subject to reify, "thingify" or hypostatize "rights" and other "legal relations." (Ibid., 475–6. Emphasis added)

Cook proceeds to draw interesting conclusions for the conflict of laws on the basis of his general remarks on scientific method, regarding questions such as what it means for a Massachusetts court to enforce a Maine right (Ibid., 467–75), though a consideration of these conclusions clearly falls outside the scope of this essay. What is of interest here is that he appears to have been concerned with the analysis of *fundamental legal concepts*,

not the study of adjudication, and that he appears to have accepted the narrow conception of *semantic* naturalism, in addition to *methodological* naturalism of the type that requires "methods continuity" with the sciences.

6.4 Felix Cohen

In his well-known article on the functional approach to legal science (1935), Felix Cohen casts a critical eye on many of the legal concepts that are used by (what he refers to as) traditional jurisprudence (See also 1937). Having considered the way in which courts approach legal problems, such as whether a corporation can be said to exist in a certain state and not in another, he summarizes as follows what he takes to be the basic assumptions of traditional jurisprudence in regard to legal concepts:

> *Legal concepts* (for example, *corporations* or *property rights*) are supernatural entities which do not have a verifiable existence except to the eyes of faith. *Rules of law*, which refer to these legal concepts, are not descriptions of empirical social facts (such as the customs of men or the customs of judges) nor yet statements of moral ideals, but are rather theorems in an independent system. It follows that *legal argument* can never be refuted by a moral principle nor yet by any empirical fact. Jurisprudence, then, as an autonomous system of legal concepts, rules, and arguments, must be independent both of ethics and of such positive sciences as economics and psychology. In effect, it is a special branch of the science of transcendental nonsense. (1935, 821)

As one might expect, Cohen has no patience with (what he refers to as) supernatural concepts, that is, concepts that do not refer to natural entities: "Against these unverifiable concepts modern jurisprudence presents an ultimatum. Any word that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it." (Ibid., 823)

Having criticized traditional jurisprudence and the belief in supernatural concepts, Cohen goes on to introduce (what he calls) the functional approach to jurisprudence. This approach, he explains, involves the eradication of meaningless concepts, the abatement of meaningless questions, and the redefinition of concepts (Ibid., 822–34). The constructive aspect of the functional approach, then, concerns the redefinition of concepts, and the core idea appears to be that of analyzing concepts in terms of

natural entities. Having pointed to a number of (then) contemporary philosophers, such as Charles Peirce, William James, Bertrand Russell, Rudolf Carnap, and Ludwig Wittgenstein, who are all said to endorse the functional approach, Cohen offers the following description of this approach:

> It would be unfair to minimize the real differences between some of these schools, but in one fundamental respect they assume an identical position. This is currently expressed in the sentence, "A thing is what it does." More precise is the language of Peirce: "In order to ascertain the meaning of an intellectual conception one should consider what practical consequences might conceivably result by necessity from the truth of that conception; and the sum of these consequences will constitute the entire meaning of the conception." The methodological implications of this maxim are summed up by Russell in these words: "*Wherever possible, logical constructions are to be substituted for inferred entities*." In other words, instead of assuming hidden causes or transcendental principles behind everything we see or do, we are to redefine the concepts of abstract thoughts as constructs, or functions, or complexes, or patterns, or arrangements, of the things that we actually see or do. All concepts that cannot be defined in terms of the elements of actual experience are meaningless. (Ibid., 826. Footnotes omitted)

Cohen thus seems to have accepted the narrow conception of semantic naturalism. He does not seem to have accepted methodological naturalism of any type, however.

6.5 Conclusion

We have seen that on Leiter's analysis, the American realists were concerned solely with the study of adjudication and that they were methodological naturalists of the type that requires "methods continuity" with the sciences, and replacement naturalists who aim to substitute a descriptive/explanatory account of adjudication for traditional, normative theories of adjudication. But we have also seen that at least some American realists, such as Oliver Wendell Holmes, Walter Wheeler Cook, and Felix Cohen, were interested in the analysis of fundamental legal concepts, and embraced the narrow conception of semantic naturalism.

7 Jurisprudential Naturalism in Scandinavia and in the United States: Similarities and Differences

We have seen that the Scandinavian and the American realists were not as different in regard to their naturalism or their choice of study-object as one might have thought. Although Leiter presents the Americans as methodological and replacement naturalists, who were concerned solely with the study of adjudication, and although the Scandinavians were primarily semantic and ontological naturalists, who were mainly concerned with the analysis of fundamental legal concepts, we have seen that Holmes, Cook, and Cohen were primarily – in Cohen's case solely – semantic and possibly ontological naturalists, who were mainly concerned with the analysis of fundamental legal concepts, and that Ross and Lundstedt were also methodological naturalists, even though they were not much concerned with the study of adjudication. This means that Ross and Lundstedt were the Scandinavian realists whose naturalism was most similar to the naturalism of the American realists, and that Cohen was the American realist whose naturalism was most similar to the naturalism of the Scandinavian realists.

I think we might be able to explain the differences that do exist between these thinkers – individually as well as collectively – regarding the choice of jurisprudential study-object by reference to differences in their naturalistic commitments. For, generally speaking, I believe it makes sense to conceive of one's naturalism – one's view about the world, about knowledge and scientific method, and about conceptual analysis – as more fundamental than one's view about what is and what is not an appropriate or interesting jurisprudential study-object. And I also believe it is natural to assume that a jurisprudent who accepts semantic naturalism is likely to focus on the analysis of fundamental legal concepts (like Ross, Lundstedt, Holmes, Cook, and Cohen), and that someone who accepts methodological naturalism of the type that requires "methods continuity" is likely to focus on the study of adjudication, or to advocate a predictive analysis of legal concepts (Ross, Lundstedt, Holmes, Cook). The connection is straightforward in both cases: Since semantic naturalism is a view about conceptual analysis, a semantic naturalist is likely to have an interest in the analysis of fundamental legal concepts; and since methodological naturalism of the type in question aims at causal explana-

tions, a methodological naturalist of this type is likely to have an interest in such explanations, and to choose a study-object that lends itself to analysis in causal terms, such as the study of adjudication, or to advocate a predictive analysis of legal concepts. Against this background, I suggest that the commitment to semantic naturalism on the part of the Scandinavians might explain their emphasis on the analysis of fundamental legal concepts; and that the commitment to methodological naturalism of the type that requires "methods continuity" on the part of a majority of the Americans might explain their emphasis on the study on adjudication and their preference for predictive analyses in the field of conceptual analysis.

But, as Iain Cameron has reminded me, it might also be possible to explain the differences in regard to the choice of jurisprudential study-object by reference to differences between the American and the Scandinavian legal cultures. Of special interest in this regard is the emphasis on the study of adjudication in American jurisprudence,[34] which might explain the preference on the part of the American realists for a focus on the study of adjudication. I must leave it an open question which type of explanation is to be preferred.

I should also like to acknowledge what may be obvious to the reader: that the result of a comparison between Scandinavian and American realism, like any comparison between two schools of thought, may depend to some extent on which writers are chosen as representatives of the respective school. The Scandinavians are easy in this respect: The relevant writers are Alf Ross, Karl Olivecrona, and Vilhelm Lundstedt, and perhaps Axel Hägerström, though in my view Hägerström is better thought of as the "spiritual father" of Scandinavian realism. The Americans are more difficult, because there were so many of them, and because they were quite a diverse group of writers. My choice of Holmes, Cook, and Cohen cannot be said to be neutral, but was designed to show that there were some American realists who were similar to the Scandinavian realists in that they accepted semantic, and possibly also ontological, naturalism

[34] Indeed, H. L. A. Hart (1983a, 123–4) once remarked that American jurisprudence is "marked by a concentration, almost to the point of obsession, on the judicial process," and explained this feature of American jurisprudence by reference to the "quite extraordinary role which the courts, above all the United States Supreme Court, play in American government."

and concerned themselves with the analysis of fundamental legal concepts. In this way, my analysis can perhaps be seen as a counterweight to Leiter's analysis, discussed above.

8 Naturalism and Conceptual Analysis

We have seen that Ross, Olivecrona, Cohen, Holmes, and perhaps also Cook, believed in and practiced conceptual analysis, while embracing a naturalist research program. One may, however, wonder whether a commitment to conceptual analysis can be squared with a commitment to naturalism, specifically methodological naturalism, given that appeal to *a priori* intuitions – against which the conceptual analyst is supposed to test the proposed analysis – is said to be incompatible with naturalism. George Bealer, for example, has argued that (methodological) naturalists accept a principle of empiricism, according to which a person's experience and/or observations comprise his *prima facie* evidence of beliefs or theories, and that appeal to *a priori* intuitions contradicts the principle of empiricism. (1992, 108–18)[35]

Let us assume that Bealer is right. What should naturalists do? Well, assuming that they are methodological naturalists, it seems to me that they might adopt a more relaxed understanding of conceptual analysis, which does not involve appeal to *a priori* intuitions. For example, they might follow Frank Jackson (1998, 44), who defends "modest" conceptual analysis, which aims to determine not what the world is like, but "what to say in less fundamental terms given an account of the world stated in more fundamental terms" (see also Coleman 2001, 179.), and who recommends that, if necessary, we do opinion polls to become clear about what people think about the application of the relevant concept. (1998, 36–7)

Alternatively, naturalists might go in for *explication* or rational reconstruction of concepts. To explicate or rationally reconstruct a concept, *C*, amounts to transforming *C*, which we may call the *explicandum*, into a concept that is more exact, which we may call the *explicatum*, while retaining its intuitive content, in order to make it more functional for a certain purpose (Carnap 1950, 3–5). This involves starting out from the (abstract or concrete) objects that fall under *C*, and proceeding to provide

[35] Bealer also argues that this means that we should reject naturalism, not conceptual analysis, but that is another matter. See also Bealer (1987).

an analysis of *C* that fits most, though not necessarily all, of those objects. To explicate a concept, then, involves changing both the *intension* and the *extension* of the term that expresses the concept, in order to make the concept more functional for a given purpose, which means that an explication is partly prescriptive.

But one might object to this that if philosophers were to analyze concepts in a more relaxed manner, or to give up conceptual analysis in favor of explicating concepts, they would no longer be in the business of establishing *analytical* equivalences between the *analysandum* and the *analysans*, but only "strictly ethnographic and local" equivalences (See Leiter 2007, 177).[36] And, as Leiter sees it, conceptual analysis would then "become[] hard to distinguish from banal descriptive sociology of the Gallup-poll variety." (Ibid., 177)

I am not sure that this would be a serious problem, however. Surely even conceptual analysis of the "strictly ethnographic and local" kind may be quite valuable. The interesting question, as I see it, is just how general (or local) the proposed analysis is. The more people you poll about the application of the concept, the more general – and in that sense the better – the analysis will be. Against this background, I find Hilary Kornblith's characterization of conceptual analysis on the model of the investigation of natural kinds appealing and a possible model for the analysis of legal concepts, even though the latter clearly concern *artificial*, not natural, kinds:

> The examples that prompt our intuitions are merely obvious cases of the phenomenon under study. That they are obvious, and thus uncontroversial, is shown by the wide agreement that these examples command. This may give the resulting judgments the appearance of a priority, especially in light of the hypothetical manner in which the examples are typically presented. But on the account I favor, these judgments are no more a priori than the rock collector's judgment that if he were to find a rock meeting certain conditions, it would (or would not) count as a sample of a given kind. All such judgments, however obvious, are a posteriori, and we may view the appeal to intuition in philosophical cases in a similar manner. (2002, 12. Footnotes omitted)

One might, however, object that conceptual analysis of the local kind is *self-refuting*, in the sense that it *presupposes* precisely what it claims

[36] Leiter does not speak of analytical equivalences, but of analytical truths. And he does not discuss the explication of concepts.

does not exist, viz. a *universal* concept of law (or a universal concept of a legal rule or of a legal right, etc.). For if one believes, as one surely must believe, that there is, or could be, more than one local concept of law (or more than one local concept of a legal rule, etc.), one needs to be able to explain what makes them concepts of *law*, rather than concepts of something else. And if one reasons that they qualify as concepts of *law* on the ground that they share certain important features,[37] one should probably conclude that precisely those features are definitive of the *universal* concept of law – what else could they be? So there appears, after all, to be a universal concept of law.

Of course, one might respond to this objection that the features in question are definitive not of the universal concept of law, but of *our* (local) concept of law (Raz 2005, 332), and that therefore modest conceptual analysis is not self-refuting, after all. But, one wonders, doesn't this response lead straight to some type of *relativism*, according to which an entity, *X*, qualifies as a concept of law (or a concept of a legal rule, etc.) only given a certain starting point (a certain concept of law), *Y*, and no such starting point, Y_1-Y_n, is privileged as the one true starting point. I do not think so. For it seems to me that we might conceive of the various starting points (the various local concepts of law) as *conceptions* of an underlying *concept* (the alleged universal concept of law), in the sense that they are interpretations of this concept, or, if you will, attempts to "spell out" its import.[38] And since the conceptions clearly exist on a different plane than the concept, they do not compete with it. Hence the existence of a concept – as distinguished from the conceptions – does not undermine the claim that there are a number of local conceptions and no universal concept.

What, then, about the Realists' positions? Was their commitment to conceptual analysis compatible with their commitment to naturalism in one form or another? They certainly appear to have thought so, though

[37] To be sure, there may be cases where the concepts in question (or the objects that fall under them) will be linked by nothing more than so-called family resemblance. If so, the objection will not hold. On family resemblance, see Wittgenstein (1968, sections 65–7).

[38] For the distinction between concepts and conceptions, see Rawls (1971, 5); Dworkin (1978, 134–6). For a line of reasoning that nicely illustrates the distinction between concept and conceptions, Swedish-speaking readers may wish to consult Ingemar Hedenius's ideal-type analysis of the concept of ownership. Hedenius (1977). I would like to thank Jan Österberg for pointing out that the distinction between concept and conceptions may be useful in this context and Lennart Åqvist for suggesting that I read Hedenius's article.

none of them appears to have touched on this question in their writings. But whereas Olivecrona rarely spoke about conceptual analysis at all,[39] Ross (as we have seen) was explicit that jurisprudence is the logic of legal science, and that the pre-eminent task of jurisprudents is to analyze fundamental legal concepts at a time (1959) when Quine's critique of the analytic-synthetic distinction was widely known and discussed. So Ross cannot have been troubled about the very possibility of conceptual analysis within a naturalist framework. Cook and Cohen, for their part, simply advocated that we analyze concepts in empirical terms.

I believe Ross, Olivecrona, Cook, and Cohen were right to assume that there was no serious problem here, because they all practiced conceptual analysis in a modest way that did not involve appeal to *a priori* intuitions, but rather appeal to what judges and legal scholars in general believe. Moreover, Olivecrona and Cohen do not appear to have accepted *methodological* naturalism, which means that we cannot assume that they accepted the principle of empiricism, mentioned above. And if they didn't, there seems to be no reason to doubt the compatibility of naturalism and conceptual analysis in their cases.

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[39] But see Olivecrona (1928).

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The American and Scandinavian Legal Realists on the Nature of Norms

Introduction

There is a large literature on American legal realism and Scandinavian legal realism, individually, or (less often) together.[2] Much has been written on the way the two schools of thought overlap, and on the ways in which they diverge. The present article focuses on one distinct theme that involves both convergences and divergences between the two schools: the problem(s) of the nature of legal norms and the grounding of legal truth.

The problem of legal normativity involves the hybrid nature of legal claims: that they use the moral language of "ought," "right," and "duty," but they purport not to be purely moral claims, but rather something else entirely. Is there a separate type of reality which consists of norms? And, if so, is there yet another world which consists only of legal norms?

The problem of legal truth is the surprising difficulty of determining what it is that makes legal propositions true or false. When we make a claim about what the law requires or what it permits, what facts in the world make such claims true or false, and are there significant periods (e.g., prior to the announcement of a judicial decision on the subject) when legal propositions are neither truth nor false?

Part I sets out the problem of normativity and legal truth. I consider the views of the American legal realists in Part II and the Scandinavian legal realists in Part III, before returning to recurring issues in the area in Part IV, and then concluding.

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[2] E.g. Hart, 1959; Fisher, Horwitz & Reed, 1993; Schlegel, 1995; Martin, 1997; Alexander, 2002; Bjarup, 2005; Leiter, 2007.

I. The Problem(s)

I will begin with the issues relating to legal truth. When we say that "X has a legal right to do N" or that "the contract between A and B is enforceable," what is it that makes statements of that kind true or false? This seems to be, in a way, the easiest of questions. After all, it is the most basic aspect of legal practice, which all lawyers have been trained to understand fluently, and which many non-lawyers believe that they adequately understand. For even non-specialists think they know some basic things about the law, including, at the least, that propositions about what the law requires can be true or false, and the sort of things that make those propositions true or false.

One can push the point, and say, that if there is no straightforward answer to the question of legal truth, then a great deal of the fine words we offer regarding "the rule of law" and of our governments being "ones of laws and not of men," may be nonsensical.

The answer to the problem of legal truth is obvious, we are told by one and all: what makes a legal proposition true are authoritative legal source materials. We have the legal rights and legal duties we do because of statutes that have been lawfully passed, decisions handed down by judges, and written provisions in constitutional documents. However, those who are legally trained, or who have had close dealings with lawyers or litigation know that it is rarely that simple.

Statutes (and other legal norms) are usually written in general language or in legal jargon, which may not apply easily to the facts that are presented, especially when the passage of time creates circumstances, technologies and problems that the statutes' drafters could never have foreseen. Additionally, even when the legal materials seem to apply in straight-forward ways, we might have doubts about those applications, because they seem contrary to the lawmakers' purposes, or the applications may lead to results that seem absurd or unjust. Finally, there may be multiple legal texts, all of which seem to apply, but the different texts appear to be inconsistent in the outcomes they indicate.

Thus, while most people may think that the truth of legal propositions is a straight-forward matter, on reflection, we also aware of two commonplace truths about our legal system(s): first, that a large part of the need for lawyers is in the interpretation of complex and seemingly inconsistent legal materials; and second, that for many harder legal questions, competent lawyers can disagree about what the law requires.

A third point: even where the answer to a legal question appears to be easy, and all competent legal commentators agree on what the answer is, there is still a chance that the legal officials (say, the judges on the highest court) will put forward a contrary legal result as part of deciding some dispute. Such an outcome might be, in a sense, a "mistake," but with our legal system, "mistakes" promulgated by authoritative actors are often treated (if sometimes not initially, then in due course, if not corrected or overruled) as valid law.

The point – and this has been noted by many legal commentators[3] – is that the ontology of law is doubly strange: it seems to use conventional normative language, about what "should" or "should not" be done, but simultaneously holds itself separate from conventional normative discourse – thus, one can say that "according to law, I ought to do X" and, at the same time, "morally [or prudentially or all things considered], I ought *not* to do X." All of modern legal positivism (especially the works of Hans Kelsen, H.L.A. Hart, and Joseph Raz) can be seen as attempts to create a way of talking about the normative discourse of law without, on one hand, reducing it to purely empirical terms, but also, on the other hand, without treating law (as some natural law theories appear to do) as merely a subset of morality.[4]

In the discussions that follow, it should be noted that while there were numerous theorists described (and self-described) as part of the American legal realist movement, there are few positions that can be ascribed to all of them, so the following characterization of their views is a generalization that will fit many, but by no means all of them.[5] For the Scandinavian legal realists, I assume that there is a similar problem with generalizations, though the English-speaking world is only broadly aware of four theorists connected with that school – Axel Hägerström (actually more the inspiration for the movement than part of it), Alf Ross, Karl Olivecrona, and A. V. Lundstedt – so we may well not be aware of the full variety of that school.

[3] See, e.g., Kelsen, 1992, 8-14; Raz, 1990, 170-77.

[4] Raz, 1996, 16 & n.16.

[5] For the range of views among the American legal realists, see, *e.g.*, Llewellyn, 1931.

II. The American Legal Realist Response

The American legal realists were a diverse group of theorists active during the 1920s, 1930s, and 1940s, whose work challenged ideas about legal reasoning and adjudication dominant in judicial and legal academic writing at the time. Their work has remained strongly influential in American legal scholarship and legal education, though the nature and value of their legacy remains a matter of contention.

The American legal realists were strongly influenced by the work of Oliver Wendell Holmes, Jr (1841–1935), and the sociological jurisprudence that Roscoe Pound (1870–1964) wrote early in his career (later Pound was to become a critic of the realists), as well as theorists from the European "Free Law" movement.[6] Prominent figures in the American legal realist movement included Karl N Llewellyn (1893–1962) and Jerome Frank (1889–1957).

The American realists asserted that a proper understanding of judicial decision-making would show that it was fact-centered, and that judges' decisions were often based (consciously or unconsciously) on personal or political biases and constructed from hunches. They also argued that public policy and social sciences should play a larger role in judicial decisions. The realists claimed that judicial decisions were strongly underdetermined by legal rules, concepts and precedent (that is, that judges in many or most cases could, with equal warrant, have come out more than one way). Feeding into this central focus on adjudication was a critique of legal reasoning: a claim that beneath a veneer of scientific and deductive reasoning, legal rules and concepts were in fact often indeterminate and rarely as neutral as they were presented as being.

The form of legal analysis dominant at the time the realists were writing was criticized as "formalistic." "Formalism" (also sometimes called "conceptualism" and "mechanical jurisprudence") was an extreme view about the autonomy of legal reasoning, and entailed judicial analysis that moved mechanically or automatically from category or concept to conclusion, without consideration of policy, morality, or practice. The argument against formalism was that the rushed move from category to legal conclusion was both unwarranted and unwise.

[6] See Herget & Wallace, 1987

The American legal realists grounded their approach on an instrumental view of the law: that it was a tool meant to serve social purposes, and to whatever extent it did not serve those purposes, or did not serve them well, the law should be changed. This attitude was also reflected both in the law reform work that many American realists did for President Franklin D. Roosevelt's "New Deal" programs, and in Karl Llewellyn's later efforts, as the primary author of and moving force behind Article 2 of the American Uniform Commercial Code (UCC), a code regulating the sale of goods.[7]

American legal realism can be seen as the forerunner of more recent jurisprudential schools of thought – e.g., law and economics, critical legal studies, critical race theory and feminist legal theory. By undermining confidence in the "science" or autonomy of law and the ability to deduce unique correct answers from legal principles (as well as questioning the "neutrality" of those legal principles), the American realists created a need for a new justification of legal rules and judicial actions. Also, they offered a set of arguments (*e.g.* arguments about the indeterminacy of law and challenges to a "public"/"private" distinction in law) that later critical approaches would use to support claims of pervasive bias (against the poor, against women and against minorities) in the legal system.

Regarding normativity and legal truth, the American legal realists, led by the proto-realist, Oliver Wendell Holmes, Jr., equated the existence of a legal norm with a prediction of enforcement by a judge (or some other legal official). Holmes once famously characterized this approach as "the bad man's view of law."[8]

Under this approach, to say that one had a legal right would be to say that under the appropriate circumstances a judge would rule in one's favor in a dispute. (Holmes went further in this sort of reduction, arguing that a contractual right meant nothing other than that one had a right to *either* performance or the payment of a certain level of damages.[9])

Like the Scandinavian legal realists (discussed below), there was a demystifying element to much of the work within the American legal real-

[7] UCC Article 2 reflects a realist approach, in that its legal standards purport to reflect the customs and expectations of business people, rather than trying to impose legal technicalities upon them.

[8] Holmes, 1897, 460–461.

[9] *Ibid*., 462; Holmes 1963, 236.

ist tradition.[10] While with Holmes on one hand, and the Scandinavian realists on the other, the object was to remove the moralistic language that (they argued) put nonsense where reality should be, for many of the American realists the need to demystify came from a suspicion that the rhetoric of legal and (especially) judicial reasoning hid political biases.

The American realist Karl Llewellyn famously wrote of the distinction between "real rules" and "paper rules," emphasizing how doctrinal rules are often (though not always) both poor summaries of past decisions, and poor predictors of future decisions. "Real rules" were rules that actually affected the decisions judges reached, and could be used both to summarize past decisions and accurately to predict future decisions. "Paper rules," by contrast, were merely decorative: justifications or labels attached after the fact for decisions that were in fact reached on other grounds.[11]

Jerome Frank focused on a different source of uncertainty in predicting court decisions: that both jury and judicial fact-finding are frequently the product of bias, error, or simple perjury. He located the source of much of the unpredictability or indeterminacy of law in trial court fact-finding rather than (as many of his fellow realists had, as well as many later critical theorists) in the understanding and application of the legal standard itself.[12]

To varying degrees, to be sure, but the major American legal realists – from Holmes to Llewellyn to Frank – all focused on the actual decisions of the judges, dismissing much discussion of purported legal rules and doctrine as language, at times nonsensical, that had the effect (and perhaps the intention as well) of misleading people about the law.

[10] The best example is probably Cohen, 1935. Demystification was also an important objective for the great English commentator on law and politics, Jeremy Bentham. See Hart, 1982.

[11] Llewellyn 1930, 434.

[12] *E.g.*, Frank, 1949.

III. The Scandinavian Legal Realists

The Scandinavian legal realists wrote around the same time as the American legal realists, but they had significantly less long-term influence, and they are now only rarely read (even in their home countries). The movement's intellectual leader was the philosopher, Axel Hägerström (1868–1939); and its most prominent theorists were Alf Ross (1899–1979), Karl Olivecrona (1897–1980), and A.V. Lundstedt (1882–1955).[13] Scandinavian legal realism was based on a skeptical approach to metaphysical claims in general, and metaphysical language in law in particular.

Much of the work by the Scandinavian legal realists attempts to translate references to "rights", "duties", "property", etc., to more empirical terms, rejecting any explanation that seemed to posit unworldly entities. Instead, these theorists sometimes offered psychological and anthropological explanations to fill the vacuum (*e.g.*, that these terms referred to subjective feelings of empowerment or constraint, or were connected to ancient beliefs in magic). Other times, the normative terms were reduced to predictions of, or authorizations for, institutional sanctions.

The Scandinavian legal realists, like their American counterparts, were uncomfortable with mere assertions of the reality of legal rights and duties. They looked for a more "scientific" approach to law and legal theory, one analogous to (and sometimes influenced by) the ideas of logical positivism. That is, the Scandinavian legal realists wanted to focus on what was factual, verifiable, "real."

The English political and moral theorist Jeremy Bentham had once referred to talk of "moral rights" or "natural rights" (what many would now call "human rights") as "nonsense … nonsense on stilts."[14] His primary complaint was that a claim of a moral right has nothing in the real world to which it corresponds. Interestingly, Bentham did not have a similar complaint about legal rights, as he believed that there were things in the world to which one could point in making a claim of legal right: authoritative legal texts, and the possibility of enforcement actions being taken by legal officials. In this sense, Bentham was more like the American legal realists than the Scandinavian legal realists, for the latter had doubts about the real-world correspondents for legal rights as well.

[13] Most of the focus of this paper will be on Ross and Olivecrona. For more on Hägerström and Lundstedt, see Hägerström, 1953; Lundstedt, 1956; Olivecrona, 1959, Passmore, 1961.

[14] Bentham 1987, 53.

Axel Hägerström, the philosophical inspiration for the Scandinavian realists, argued that legal rights and duties were thought of in magical terms in ancient Roman times, as one was said to fight harder in battle when one had "right" on one's side. Having a *legal* right was said to make one feel that one had power over the correlative duty-holder, and the duty-holder felt that he or she had a burden, or felt beholden to or tied to the right-holder.[15]

Similarly, for Karl Olivecrona, legal rights raise the challenge of, on one hand, implying a metaphysics that the Scandinavian legal realists deny, but, on the other hand, being seemingly indispensable to any discussion about law.[16]

While Olivecrona asserted a vague anti-metaphysical position (associated with Hägerström[17]), and without affirming logical positivism as such, the endpoint of his approach seems similar to that of logical positivism: skepticism of any object or claim that cannot be translated into an empirical observation or prediction.

At the same time, Olivecrona rejected the American legal realists' effort to translate legal rights into summaries of past official actions and predictions of future official action.[18] The American legal realists attempted to equate legal rights with certain facts in the world – a project with which Olivecrona sympathizes – but their conclusions were insufficient. Contrary to the American realists, a legal right does not equate with the state's having enforced the right-holder's interest, or a guarantee that it would do so if and when a conflict arises.[19]

Olivecrona compared legal rights with money: that legal rights can operate as central elements in our (legal) life, even without having an object, just as "dollar" and "pound (sterling)" operate as central to our (economic) life without having any object they describe (at least since the end of the gold standard).[20] And, like H.L.A. Hart in his earliest works,[21] Olivecrona thought that insight on the nature of legal rights

[15] See Hägerström, 1953; Passmore, 1961; Olivecrona, 1971, 175–176.

[16] See Olivecrona, 1962, 166–69; see also Olivecrona, 1971, 158–9, 165–7, 184.

[17] A good summary of the connections between Olivecrona and Hägerström is given by Bjarup, 2005.

[18] Olivecrona, 1962, 156–60.

[19] *Ibid.*, 156–60, 185; see also Olivecrona, 1971, 171–4.

[20] Olivecrona, 1962, 170–3.

[21] Hart, 1948–49.

could be found by reference to J. L. Austin's idea of "performative sentences".[22]

Olivecrona's theoretical end-point regarding legal rights was emphasizing their psychological effects on other participants in the legal system. Where there is sufficient regularity in legal practice and social expectations, the declaration that someone has a legal right (or legal duty) brings forth in hearers ideas of powers, permissions, and prohibitions, rights are "an instrument of social control and social intercourse",[23] even though there is no objective entity that corresponds to "legal right" (or "legal duty").[24] Rights serve as "signs" telling us what to do and what not to do (*e.g.*, that we can do what we like with the objects we "own", but should not interfere with objects that "belong" to another); legislation establishes and regularizes the standards by which rights are created and modified; and court decisions, backed up by official means of enforcement, serve both to effect and reinforce claims and expectations connected with legal "rights" and "duties".[25]

Alf Ross's approach to jurisprudence was simultaneously simple and radical: he wanted to rid from our thinking about law all the mystifying references to abstract concepts and metaphysical entities:

> The leading idea of this work is to carry, in the field of law, the empirical principles to their ultimate conclusions. From this idea springs the methodological demand that the study of law must follow the traditional patterns of observation and verification which animate all modern empirical science; and the verification demand that the fundamental legal notions must be interpreted as conceptions of social reality, the behavior of man in society, and as nothing else.[26]

[22] Olivecrona, 1962, 177–81; on "performatives", see Austin 1956, 235.

[23] Olivecrona, 1962, 191.

[24] *Ibid.*, 177–89; see also Olivecrona, 1971, 183–216.

[25] Olivecrona divides the functions of legal rights into their "directive function" ("signs"), their informative function (how, *e.g.*, being informed that X owns property A gives us likely information about the relationship of X and A, as well as what legal procedures will be required should one wish to purchase A, or rent space in A); and their role in the administration of justice (how judicial declarations regarding rights necessarily take precedence over any pre-existing "truth" regarding those rights). Olivecrona, 1971, 186–216.

[26] Ross, 1959, ix; see also Ross, 1989, 10 ("The way to conquer dualism and its unfortunate consequences is … to interpret the ideas of a superempirical 'validity' as rationalisations of certain emotional experiences and thus include them in the world of facts.").

This is the power – and the mystery – of Scandinavian legal realism, its efforts to translate legal concepts into the stuff of verifiable social sciences.[27] For Ross, concepts like "right", "validity" and "obligation" have to be translated into observable behavior (including perceptions of bindingness, inclinations for behavior or likelihood of behavior).[28] Consider the following example: "That A is 'bound' to perform a certain action F, then only means that the opposite behavior, non-F, is one of the conditions determining the expected occurrence of a reaction of compulsion against A."[29]

For Ross, references to legal rights and duties did not correspond to anything real in the world, but he was willing to argue that the terms did play a role in legal discourse (and not just one of mystification). He thought "legal right" and "property" and similar legal terms played a role in legal discourse, even if they did not name anything that actually exists. Such legal terms, Ross argued, work as a kind of shorthand. The legal term connects a wide range of factual predicates to a long list of possible legal consequences: thus, one can obtain property through discovery, invention, gift, bequest, etc., and the resulting "ownership" gives one the right to exclude, the right to sell, a right to give as a gift, etc.

It is important to note that though Ross was critical of the metaphysical implications of much talk of rights, he dissented from the views of other Scandinavian legal realists who would excise the term from legal discourse.[30] He thought that concepts like "right" (or "ownership") simply were useful short-hands, "tools of presentation" for rephrasing the legal

[27] H.L.A. Hart's description of Axel Hägerström's work was meant also as an overview of all of Scandinavian legal realism:

> [It] is a sustained effort to show that notions commonly accepted as essential parts of the structure of law such as rights, duties, transfers of rights, and validity, are in part composed of superstitious beliefs, "myths", "fictions", "magic" or rank confusion.

Hart, 1983, 161.

[28] See, e.g., Ross, 1959, 17–8 (offering an analysis of "valid law" that is meant "to raise doubts as to the necessity of metaphysical explanations of the concept of law").

[29] Ross, 1989, 176. One should note the similarity of Ross's analysis of rules (here discussing not legal rules, but the rules of chess): "The rules of chess have no reality and do not exist apart from the experience of the players, that is, their ideas of certain patterns of behaviour and, associated therewith, the emotional experience of the compulsion to obey." Ross, 1959, 16. (Ross makes it clear that he means a similar analysis to apply to legal rules. *Ibid*., 17–8.)

[30] Ross, 1957, 817–25 & n. 4; Ross, 1959, 186–8.

consequences of a series of loosely related factual circumstances.[31] A "legal right" is a convergence point: a variety of different factual predicates (all the ways that one can come to 'own' property or have a contract-based 'right') will lead to identical, or highly similar, remedial or punitive consequences (e.g., the ability to recover money damages in court from those who act in an unauthorized way regarding the property or the contract).[32] "Sentences in which [the word 'right'] occurs can be rewritten without making use of the term, yet indicating the connection in the directives of the law between conditioning facts and conditioned consequences."[33]

Still, Ross was concerned that we not fall into the trap of believing that "rights" or "claims" represent some entity, or indeed a magical sort of force:

> We … express ourselves as though something had come into being between the conditioning fact (juristic fact) and the conditioned legal consequence, namely, a claim, a right, which like an intervening vehicle or causal connecting link promotes an effect or provides the basis for a legal consequence. Nor, really, can we wholly deny that this terminology is associated for us with more or less indefinite ideas that a right is a power of an incorporeal nature, a kind of inner, invisible dominion over the object of the right, a power manifested in, but nevertheless different from, the exercise of force (judgment and execution) by which the factual and apparent use and enjoyment of the right is effectuated.[34]

The temptation to this sort of conclusion is encouraged by the "grammar" of rights statements: "The use of the concept of rights occurs in statements which do not seem to give an account of rules of law but to

[31] See Ross, 1957, 817–25 & n. 4, Ross, 1959, 170–5.

[32] Ross, 1959, 174.

[33] *Ibid*., 172–3.

[34] Ross, 1957, 818. For a similar analysis, see Hägerström, 1953, 1–6; Olivecrona, 1971, 183–5. Hägerström writes:

> It seems, then, that we mean, both by rights of property and rightful claims, actual forces, which exist quite apart from our natural powers; forces which belong to another world than that of nature, and which legislation or other forms of law-giving merely liberate. The authority of the state merely lends its help to carry these forces, so far as may be, over into reality. … We feel that here there are mysterious forces in the background from which we can derive support. Modern jurisprudence … seeks to discover facts corresponding to these supposed mysterious forces, and it lands in hopeless difficulties because there are no such facts.

Hägerström, 1953, 5–6.

be descriptions of pure facts."[35] Instead, Ross would have us remember that the statements are at most "factual, within the context of a particular set of legal rules."[36]

Ross does not claim that the people who first used such terms necessarily thought that they in fact represented strange entities or forces; Ross thinks it better (perhaps, in Donald Davidson's terminology, "more charitable"[37]) to think of concepts like 'rights' and 'ownership' as an intuitive, 'pre-scientific' simplification and rationalization.[38]

IV. Normativity and Reduction

Thus, one sees how both the American legal realists and the Scandinavian legal realists offer distinct responses to the question of the grounding of legal facts. In each case, they refuse to take the law at its face value. The discussions of "legal rights" and "legal duties" imply that there is something in the world that makes claims about such rights and duties true or false. The American legal realists grudgingly state that there is something in the world that makes the statements true or false, but that it is not what most of us think: it is the eventual decision of a judge or another legal official. This is a clear deviation of the "surface grammar" or apparent sense of legal propositions, if only in that the judge rendering the decision does not treat himself or herself as creating a new legal truth, but as reflecting an existing legal truth.

Some of the Scandinavian legal realists go further, and deny any sense in the normative references in the law, beyond a general correlation between such references and the subjective psychological feelings of strength or burden in the individuals who perceive themselves has "having" these legal rights and obligations.

[35] Ross, 1959, 173. The later work of Ludwig Wittgenstein also emphasized how sometimes grammar can mislead us. See, e.g., Hacker, 1996, 109 (summarizing Wittgenstein's analysis about the grammatical similarity but real differences between first-person avowals of pain and normal descriptive sentences, 'I have a pain' vs. 'I have a pin').

[36] Ross, 1959, 15–8, 173–5. This aspect of Ross's analysis seems similar to that of his teacher Kelsen (*ibid.*, x). See, e.g., Kelsen, 1992, 32–35. There are a number of other similarities between Ross's analysis and that of Kelsen – though many significant differences as well. One such convergence is in the view of legal rules as primarily directives to judges authorizing the imposition of sanctions. Compare, Ross, 1968, 90–2, with Kelsen, 1967, 203.

[37] See, e.g., Davidson, 1984, 136–7, 152–3, 196–7, 200–1.

[38] Ross, 1957, 821; Ross, 1959, 172.

It is important to note that one need not be a skeptic about legal normative facts to perceive difficulty in the question of the grounds of legal truth. As some other commentators have pointed out, it is difficult to speak about the truth of legal propositions, because law itself has different aspects, which are often in tension: law as a series of historical official actions, and the efforts of judges and commentators to impose coherence and structure on those decisions, and law as a process of dispute resolution, a process that may require or result in the (intended or unintended) modification of existing rules.

One path some legal theorists have taken to try to explain (legal) normativity without recourse to metaphysical entities is by reference to "reasons for action." A (legal) duty is a reason to act as the duty requires. A (legal) right creates reasons for action for the person who holds the corresponding duty, or for the judge or other legal official who is in charge of enforcing that right. One can have reasons for action without any complex metaphysical entity creating or mediating those reasons. One's being hungry is a reason for eating; one's wanting a good job is a reason to get an advanced degree; and so on.

However, "reasons for action" may merely push the analysis back one step. It may be relatively straight-forward to state that one's hunger gives one a reason for action, but another matter to state that a legal right or legal duty gives one a reason for action. For the legal realist (Scandinavian or American) can still ask about the nature, or reality, of that reason-giving entity, the (legal) right or duty. So it may be that practical reasoning analysis may not offer us any easy way of circumventing the objections the realists raise.

Conclusion

The American and Scandinavian legal realists have arguably done more than any other group of legal theorists to bring the problems of legal truth to the attention of legal scholars (and, to a lesser extent, the general public).

With both movements, many theorists were suspicious of conventional legal discourse, with its frequent discussions of legal rights and duties, but no clear sense of what those terms refer to. They wanted to reduce legal-normative language to something more empirical. In the case of the American legal realists, it was the actions of legal officials, and predictions of those actions. For the Scandinavian legal realists, it

was either subjective psychological feelings, or combinations of official actions and rules for linguistic usage.

And yet, these answers, too, feel inadequate. And I am not sure that this is merely because we have all been indoctrinated in a myth that we cannot easily give up. It is not merely in law where we (most of us, at least) take normativity seriously. We speak about what we "should" do or what we "must" do, not only in law, but also in morality and religion, in games and in etiquette, just to name some of many contexts where norms are, well, normal.

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Thomas Bull

Freedom of Expression and the Limits of Tolerance: A Swedish Saga

1 Introduction

Sagas are epic tales from the Scandinavian countries, dating from the Middle Ages. They were often realistic but also legendary and fictitious. As legal and political discussion on freedom of expression and its limits seem to have the same qualities, I will tell you a story of how Swedish law in the area of freedom of expression has developed in recent years. It is realistic in most parts, it includes some legendary topics and fiction does play a role. Furthermore, the topic is hopefully of interest to all those find comparative studies useful, even though Swedish law might seem a bit "provincial" in the global village of jurisprudence. Using the metaphor of a Saga I hope to catch your attention. I will try to show that Swedish law has some unique features that can be of more than anecdotal interest to scholars, legislators and practitioners in other jurisdictions, while at the same time being affected by the regional and global changes in how law is interpreted that is affecting every jurisdiction. It is thus something unknown and something well known, at the same time. Two substantive areas of the protection of freedom of expression will be used to illustrate this: hate-speech and whistle blowing.

The legal situation in Sweden on racist speeches (or hate-speech) will be discussed, particularly in context with the effects of incorporating the European Convention on Human Rights into Swedish law. What we will see is a rather restrictive regulation undergoing change as Swedish courts interpret the Convention and its demands on Swedish law. The limits of tolerance of extremist speeches in Sweden seem to be shifting and I will point out some of these shifts and discuss their impact. A comparison

with the USA will further highlight what is specifically Swedish/European about the solutions of the Swedish courts.

When it comes to whistle blowing, the wide protection of persons "leaking" information from public authorities under Swedish law will be discussed in regard to recent criticism of that protection. Tolerance of employees criticizing the authority they are employed in or exposing its weaknesses seems to be lower than ever. This will be analyzed in context with a shift in the way Swedish law regards the public employee, which more and more emphasizes the "employee" side of the relationship with the State and less and less the "public" component. It will be shown that public employers' demands on loyalty and efficiency are gaining ground at the expense of public insight into the workings of governmental agencies. This trend is certainly making Swedish law more "normal" in a European context, as was the case with hate-speech, but shows that this "Europeanization" is a mixed blessing. Also in this context, some reflections on differences and similarities with the legal solutions in the USA will be included.

Before we proceed to tackle these questions, we need some background information on the legal protection of freedom of expression in Swedish law. This will be done by comparing Swedish law with US law in this field, as that will serve to highlight some of the particularities of Swedish law well.

2 Different yet similar

It is difficult to imagine two democratic countries more different than Sweden and the USA when it comes to constitutional law. Sweden had an old constitution from 1809 until 1975 and in time – contrary to the situation in the USA – this document was in many ways bypassed by reality. Much of the 20th century has been known as the "constitution-less period", as fundamental political and legal changes took place without much constitutional change in the formal sense.[1] The political and legal culture of Sweden can be compared with that of the UK in the sense that

[1] I will not dwell on the well-known discussion of constitutional change in general and the differences between formal and informal changes. For the US context of this discussion see i.e. Ackerman, We the People: Transformations (1998) and Strauss, The Irrelevance of Constitutional Amendments, 114 Harv. L.R. 1457 (2001). For Nordic and Baltic perspectives, see Smith (ed.), The Constitution as an Instrument of Change (2003)

the Parliament (*Riksdagen*) is in theory supreme and that judicial review is something, if not unknown, so at least unwanted. The constitutional system of Sweden thus has had few checks and balances that a US lawyer would recognize. To this might be added that Sweden is a continental legal system, with no "common law" that gives the courts a special position in the legal system. So, all in all and only with a slight exaggeration, Swedish constitutional law has a history as different from the USA as possible.

But this is not entirely true. When it comes to the constitutional protection of freedom of expression, it is not as different as in other areas of constitutional law. On the contrary, in many ways it would be justified to regard Sweden and the USA as the two countries in the world where freedom of expression is most protected. On the other hand, this similarity is one of results only, not of legal technique. The ways in which Swedish and US law protects freedom of expression are very different indeed. Let's turn our attention to those details.

3 USA and Europe: A Substantive Approach

The US constitution provides protection of freedom of expression in the First Amendment. The rulings of the Supreme Court have supplemented the text with a number of principles, categories and judicial tests into a framework for legal analysis and judicial review. Case law has been the US solution to the problem of finding the limits of freedom of expression. A quick glance at the protection under the European Convention of Human Rights Article 10 shows a similar approach: a rather vague rule, clarified and refined by case-law from the European Court of Human Rights (ECtHR). As we can see, these two systems are very similar in structure, even if the legal solutions in substance are not always the same.

The main trust of the case law of both these systems is that the protection of expression is intimately connected with its substance. This means that certain categories of expression get more or less protection: political speech is at the core of the protected area, obscene and defamatory expressions are at the outer edge. Arguably, not only the content of the expression is of importance, as factors like the nature of the infringement or limitation, the media used and the intended audience also are relevant. Nevertheless, the legal analysis is to a large degree centred on the substance of the expression, this structures much of how other factors interplay and to what degree they are decisive.

What really makes the US approach different to the ECHR is the way the Supreme Court has used judicial doctrines like overbreadth, void for vagueness, strict scrutiny and neutrality (color-blindness) to limit the scope of regulative (and interpretive) options in coping with problems related to freedom of expression. The effect has been that the US case-law is more protective as regards freedom of expression than the European experience has been, but less attentive to issues of protecting personal integrity and the often problematic situation of ethnic or religious minorities.[2] The ECtHR has adopted a more balancing approach, with special attention on factors such as political context etc. but mainly using the principle of proportionality on the concrete case as its tool for identifying breaches of the Convention. As an example, hate-speech would be protected if it is part of a "serious" discussion of societal issues, but not if it is right-wing intolerance.[3]

4 Sweden: Formalism Above All

4.1 A technological approach

To understand the Swedish way of protecting freedom of expression, we need to travel back in time, to trace its almost legendary status in Swedish law and politics. In the 18th century, the main means of expression was printing material and disseminating it. The Swedish way of protecting expression was therefore from the start connected to the form of expression rather than its content. It is the use of a certain technique that is the starting point of our system of protection. In 1766 the first Freedom of Press Act was enacted, probably the first systematic legal instrument intended to protect freedom of expression and information. It prohibited prior restraint, regulated the criminal responsibility of expression and made public documents widely available to the public. This tradition has – with certain exceptions 1772–1809 – been continued until today. The

[2] This is of course a gross simplification, but on the whole I think it is tenable, see Barnedt, Freedom of Speech, (2005) which contains an extensive comparative analysis of different regimes that protect freedom of expression, and Bull, *Reglering av yttrandefrihet* (Regulating Freedom of Expression, 2006), which is something similar, but only includes six countries.

[3] See the case Jersild v. Denmark, 19 EHRR 1 (1995).

Freedom of Press Act in force now is from 1949 and a document that has constitutional status in Swedish law.[4]

The Freedom of Press Act sets up a specific legal framework for legal issues arising from a publication that was printed or made by some other similar techniques. Publications not made in those ways (photocopies, for example), can, under certain circumstances, also be included under the Freedom of Press Acts umbrella of rules. It is mainly a choice up to the ones who wants to spread such material if they want it to fall under the constitutional system of the Act or not. All that is needed is to clearly state the name and address of the one responsible for the material and some other pieces of information. If that is done, the material will fall under the protection of the Act.[5] The basic rule, however, is that everything *printed* is protected by the Act. The Freedom of Expression Act – also a part of the Swedish constitutional law – sets up a similar system of rules for expression through broadcasting and recording-devices. I will not discuss this Act to any great extent here, as it is almost identical to the Freedom of Press Act in all of its substantial rules, just covering other technical means of spreading expression than printing.[6] Below, the term "the Act" will refer to the Freedom of Press Act, but it may be borne in mind that in most cases the Freedom of Expression Act will have the same rules and what is said about "the Act" will be relevant for that Act as well.

Perhaps somewhat surprisingly, everything "protected" by the Act is not free to be printed and spread, not in any way. "Protected" is not the same as "allowed" (or "not forbidden") in the Freedom of Press Act. What it means to be protected by the Act, is that the Act's special rules on criminal responsibility and civil liability takes precedence over any ordinary criminal, administrative or civil law. Furthermore, its special procedure is used for any and all judicial decisions about a publication protected by the Act. This brings us to the content of the Act, what are the parts of this unique system of protection?

[4] Sweden has four constitutional laws, the Instrument of Government (1974), The Freedom of Press Act (1949), The Freedom of Expression Act (1991) and the Act of Succession (1810).

[5] This is of course an exception to the technical approach of the Act.

[6] Some differences exist, for example due to the need of regulating frequencies etc. that are special to the broadcasting area, but the constitutional principles discussed below are identical in the two Acts.

4.2 The Parts of the Machine

The first rule we need to know has already been mentioned, the rule of exclusivity. If a legal claim is to be brought against anyone on the grounds that something was printed (or otherwise falls under the Act, see above), it has to be done through the Freedom of Press Act or not at all.[7] Statutory law is not applicable in those cases. This means that the Act itself contains rules on criminal responsibility and civil liability and that these can only be changed by the procedure of constitutional revision.[8] The other main features of this system of protection of the freedom of expression are a special system of criminal responsibility, a protection for sources and informants, a prohibition of prior restraint, a special judicial procedure for cases under the Act, special rules on evidence and intent and very strict rules of limitations. All of these interact so as to form a system that makes it very difficult indeed to take legal measures against any publication that falls under the protection of the Act.

Let us take a closer look at some of the particularities of this system.[9] The second important feature we need to highlight is the rule of "single-person-responsibility". The Act stipulates that for any crime under the Act only one single person may be held legally responsible and the Act regulates this by a "chain of responsibility" in Chapter 8 of the Act. This sets out who will be criminally responsible as well as liable in case of a crime or other breach of the Act. In case this person cannot be held responsible, the "chain" stipulates who will be the next in line to be held responsible. Schematically the system works step by step, so that for pub-

[7] A useful example is the Swedish Supreme Court case NJA 1999 p. 275, in which a threat was published on the front page of a well-known tabloid. As the Act did not criminalize unlawful threats (but ordinary criminal law did), the persons responsible could not be convicted. The Act was later changed as to include unlawful threats by publication.

[8] Something that is comparatively easy in Swedish law, it takes two ordinary decisions by the Parliament with an election held in between. It is thus mainly a brake against very hasty changes of the constitutional framework. In practice constitutional revisions are never done unless a supermajority of at least 75 % of the members of Parliament accepts it, but this is a political convention and not a constitutional requirement.

[9] I will almost exclusively discuss the regulation in the Freedom of Press Act, but it should be noted that the Freedom of Expression Act of 1991 is almost identical in its structure and content and gives the same kind of protection to media like film, video, DVD etc. I will furthermore not deal with the issues of prior restraint (which is uncomplicated) and the particular way that criminal responsibility is regulated in the Act (which is of importance, but would bring us even further from the main issues of this contribution).

lications with an editor, the person responsible will be the editor, or the owner, or the printer and or the disseminator. It is only allowed to take a step "down" the chain if no one at the top can be found. In practice, this will typically leave all involved with an edited publication (such as a newspaper) free from responsibility, as the chief editor will be known.[10] All the others involved, such as authors (in edited publications), owners, printers or distributors are then free from any legal responsibility due to the publication. Under the Act, there can be no partners in crime. This formal limitation of legal responsibility – remember that the Act takes precedence over any ordinary concepts of joint responsibility in criminal or civil law – is intended to make the practical use of the freedom of expression as foreseeable and risk-free as possible.[11]

Any legal procedure against someone on the basis of a material protected by the Freedom of Press Act is restricted or made difficult by a number of procedural rules in the Act. This is the third aspect I want to highlight. First of all, all procedures have to be initiated by one single special prosecutor for the whole country, the Chancellor of Justice (*Justitiekanslern*, JK).[12] This means that all decisions to prosecute (or not) are filtered through the same individual's legal analysis and this person is at the same time expected to take the greatest possible care not to unduly infringe freedom of expression. The effect of this is that most potential cases are never even brought to court, as JK will find that the interest of freedom of expression outweighs other considerations. Very short periods of limitation make it even more difficult to start proceedings, as it will in many cases take too long before the JK is made aware of a potential crime and the rules on limitation will stop prosecution.[13] Lastly the proceedings

[10] There is a system of registration and documentation that supports these rules so that it will be ensured that information on editor, owner and printer are included in any published material. In practice this means that if there is no editor, an owner can foresee that he or she will be "the next in line" if legal consequences follow. Similarly, a printer that prints material without information on editor or owner can draw the same conclusion.

[11] There is in fact a double purpose, as the formal limitation of responsibility is paired with a fictitious test of criminal intent, the other side of the coin is that the police/prosecutor will always get *someone* and this will not be the fruits of a complicated criminal investigation, but rather a simple application of the formal rules of the Act.

[12] There is one exception, in the case of defamation the defamed person has the primary right to start proceedings and CJ does so only in rare cases (not even once a decade).

[13] In case of periodical (ordinary) newspapers, the period of limitation is six months. Other printed material (such as books) has a period of limitation of one year. (See Ch 9 § 3 of the Act) The period of six months applies to radio and TV broadcasting as well,

themselves are very special: a trial on the basis of the Freedom of Press Act is the only kind of trial under Swedish law that includes a jury, it is impossible to appeal against an acquitting verdict, so the state only gets "one shot", and the Act makes it explicit (Ch 1 § 4) that the court should be very hesitant in restricting the freedom of expression when deciding a case under the Act – the so called "instruction" of the Act.[14]

Lastly I would like to point to a fourth factor, namely the protection of informants. Every system of freedom of expression has a way of protecting sources, as the right for these to stay anonymous is recognized as imperative to the function of free speech. Swedish constitutional law has, I think, taken this concept a step further than most. Not only is there a right to be anonymous as a source, there is an explicit prohibition in the Act to ask questions on the subject of sources in any legal proceedings and this prohibition is applicable in all proceedings, barring those that concern grave issues of national security.[15] Furthermore, in the context of public authorities, it is prohibited to investigate which public employee it was that might have leaked information to the press or an author. This goes so far as to prohibit the state or local government from investigating how secret or confidential information could have found its way to the press. In essence, it is a right to expose governmental secrets as long as this is done in order to publish or otherwise make these secrets public.[16] This regulation is of course connected to the idea of a "single-person" being responsible. If informants etc. were not protected, that system of holding only one person responsible would only be an illusion, as the authorities could in practice punish more than one person for the same publication.

and the one-year limit to other technical means of distributing expressions (such as CDs and DVDs) (See Freedom of Expression Act Ch 7 § 1).

[14] For the sake of completeness, I should mention that private individuals may bring cases of defamation against others under the Act. In those cases, JK has no role, but the rules on procedure and the "instruction" apply and damages in Swedish law are quite low. Only a few such cases arise per year.

[15] Cases that never (sic.) happen in Sweden.

[16] There are, of course, some exceptions to this, mainly concerning information on defense and foreign policy issues and on individual health (most schools and hospitals are public institutions in Sweden and holds sensitive information on pupils and patients).

5 Having Your Cake *and* Eating It!

The practical impact of the way the protection of freedom of expression is protected in Sweden is that few cases ever go to court and fewer still result in convictions or damages. The limits of what can be said are not decided in courtrooms, but in public debate. Politicians and publishers are the key figures in this debate, not lawyers. On a more abstract level this might be characterized as a system that lets us have our cake and eat it at the same time. Nothing less than a paradox!

As long as a material made public falls under the Freedom of Press (or Expression) Act a number of factors make it very difficult indeed to take legal measures against it. Both substantive and procedural rules in the Acts preclude action that would ordinarily been possible. In practice, freedom of expression is thus very well protected. At the same time, the criminal and civil law – both in statutory law and in the Acts – contains rather far-reaching restrictions on freedom of expression. Two practically important areas of law can illustrate this: Defamation law does not contain a defense of truth as in many other jurisdictions and racist speech is criminalized to the extent that ridicule and "disregard" is prohibited.[17] We can thus see that Sweden has a regulation in law that in substance is not as friendly to freedom of expression as for example the USA, but that *the formal structure* of the constitutional regulation in practice leads to a result that is very much the same as in the USA.

Pragmatically, you might say that the Swedish system of protecting freedom of expression allows politicians to legislate against speech that is upsetting, unsettling and intimidating, as long as this is done in the form of constitutional amendments. As the Swedish constitution is very easy to amend, that is not a very hard obstacle for a majority in the Parliament to overcome. At the same time the Act system makes sure that little of that kind of legislation will have any real silencing effect, as few cases will ever see the inside of a court. The politicians get their opportunity to act opportunistically – silencing what they (or the public) cannot

[17] See the Criminal Code Ch 5 para 1 (defamation) and Ch 16 para. 8 (incitement to hate on the basis of color of skin, religion and sexual orientation). In the preparatory works to the latter, the criminalization of hate speech, it is mentioned that all discussion of groups of peoples that goes beyond a sensible and factual (*saklig och vederhäftig*) discussion falls under the law. It does not take much "hate" to be hate-speech, one might say. I will discuss this in greater detail below.

bear to hear – while the function of freedom of expression is basically untouched. The very fact that all cases must go through the Chancellor of Justice makes sure that prosecutions on the basis of expression that falls under the Acts will never be a common thing. Together with other ingredients mentioned above, the practical impotence of any restriction on freedom of expression is almost assured.

Is this a masterstroke of political and legal prudence – making it possible to bow down to public opinion without actually abandoning the ideals of free speech – or an unwarranted manipulation of the political process – making the public and those elected think that they can change the balancing of interests in this fundamental area of law, when they really cannot? To this question there is no clear answer, but it is clear that in Sweden the discourse on free speech and its limits is not generally played out in the legal arena, that the courts in Sweden cannot (until recently, perhaps) be considered to be part of a greater project of spreading tolerance in society[18] and that public attitudes towards racism or political extremism is not one of tolerance.[19] The latter is also, as mentioned, reflected in the substantive legislation. The conflict between the general opinion and the constitutional framework of the Freedom of Press Act is not easily observable, as in the case when the First Amendment of the US constitution stops legislative action, because the Act does not really stop any attempt to restrict free speech, it just dissipates it. This means that potential conflicts of values in a way are "swept under the carpet" instead of brought out into the open. Perhaps we can see a glimpse of that elusive concept (political/legal) "culture" in this and that is all there is to it.

6 Cracks in the Armor

The system of protection of freedom of expression described above might seem exotic, but it all the same puts Sweden at the top of the league for legal protection of freedom of expression in the world. All will be well, one might think. Of course, that is not the case; there are several prob-

[18] As, for example Bollinger, The Tolerant Society, (1986) argues that the courts have a role in "teaching" tolerance and Gottlieb/Schultz, The Empirical Basis of First Amendment Principles, 19 Journal of Law & Politics, 145 (2003).

[19] This is clear from the substantive legislation on limits on freedom of speech, as well as from the public debate, where most voices heard argue for more restrictions on intolerant speech.

lems with the formalistic approach of the Swedish constitution. Some of them are currently being investigated by a legislative committee on a constitutional revision of the Freedom of Press Act and the Freedom of Expression Act. At the core of the problem is the idea of tying the protection to the use of certain techniques, as the technological rate of change greatly outpaces the legal one. That is, however an issue that I will not delve deeper into here. Instead I will concentrate on other problems with the connection between technology and constitutional protection.

One of these is the fact that ordinary unadorned speech – spoken words to an audience at a meeting or on a street corner– is not protected under the Acts discussed above. The absence of technological means of mass-production of the expressions leaves these kinds of "simple" messages under the more general protection of the Instrument of Government, Chapter 2. This Chapter contains a very general statement that freedom of expression must not be infringed unless important societal interests so demand and that the principle of proportionality must be observed when such legislation is passed. As a constitutional barrier against infringements of freedom of expression, the regulation in Chapter 2 has a rather unsuccessful track record.[20] Criminal, civil and administrative law can take full effect and limit the free word in a number of ways. This is also clear in the context of what US constitutional lawyers would call "speech-plus" situations, as these seldom involve any of the techniques required to fall under the protection of the Acts. Symbolic speech and issues of "time, place and manner" are often not viewed as related to freedom of expression at all under the Instrument of Government.[21] One might suspect that the dominant position of the Acts – their almost "mythical" position in Swedish political and legal thinking – have blinded us to the importance of some of the other aspects of the free word.

Let me give you an example of this blind spot. In Sweden *offensive conduct* is a crime, sorted under the heading of "crimes against public order" in the Criminal Code (Ch 16 para. 16). It prohibits conduct that typically enrages the public and there is an obvious risk that this could be

[20] In part, this is due to the fact that judicial review in Sweden is conducted against a standard of "manifest mistake" (Ch. 11 para.14) – a standard that in practice works out rather like the "rational basis" test of US Constitutional law – all in all a very lenient attitude to the choices of the legislator.

[21] See Ch. 2 § 13 Section 3.

used in contexts where the "conduct" was in essence "speech". The preparatory works of the criminal law acknowledge this risk and direct courts not to apply the regulation as a limitation to freedom of expression. At the same time however, the leading comment on criminal law in Sweden expresses the view that the message of a certain conduct can fall under the criminalization, if that message is made public by the conduct.[22] The inconsequence of the guiding texts is apparent and has made the case law all but foreseeable. Two brief examples might be sufficient to illustrate this for our purposes. Burning or desecrating flags in clearly expressive situations have been punished under Swedish law without as much a reference to the protection of freedom of expression by the courts.[23] This is quite different from how similar cases have been handled in the USA.[24] Likewise, expressing dislike of a player in a sports game by reference to his color of skin was found to be a crime of enraging conduct, without any reference to freedom of expression.[25] The crime of enraging conduct seem to be "under the radar" of many Swedish lawyers (and judges) sensitivity to freedom of expression issues.[26]

It may seem as the Swedish system of protection of freedom of expression under the Acts gives such weight to some forms of expression that others are easily overlooked. In a world where not all have the means – financially or otherwise – to express themselves through the mass media this can be a serious problem. The difference in treatment of expression

[22] See Berggren, Brottsbalken en kommentar (The Criminal Code a comment) Ch 16 § 16.

[23] See the Court of Appeal cases RH 84:37 and RH 97:24.

[24] Texas v. Johnson, 491 U.S. 397 (1989) and Spence v. Washington, 418 U.S. 405 (1974).

[25] Judgement by Svea Court of Appeal 2006-07-04, case B 8117-05. The court does note that expressions of opinions are common during games, but that does not change its evaluation of the specific comment, which was something like "take that nigger off the field". In the context of a youth game where the accused was one of the parents, the court found the remark well beyond what could be accepted. No specific reference was made to the constitutional protection of freedom of expression or the protection offered by the European Convention, which might have had an effect on the interpretation of the criminal statute (see below).

[26] Not all, though. The Swedish Parliamentary Ombudsman (JO) has recently criticized the police for stopping expressions of opinions on the grounds of enraging conduct, see JO report to the Parliament 2006/07 p. 140 and JO decision 2008-04-10, file 2128-2006 (available on www.jo.se).

covered by the special constitutional protection of mass media and other expression becomes more and more difficult to explain rationally, particularly as people's media habits are changing.[27]

7 Racist Speech and a European Challenge from Within

7.1 Free Speech in The Supreme Court

I will now turn to the first of the substantive areas of law in this field that was mentioned in the introduction: racist and otherwise intolerant speech directed against certain groups in society. As noted above, Swedish substantive (criminal) law in this area has been rather far-reaching and restrictive from a freedom of expression perspective. One might say that the Swedish legal regulation and case law in many ways have been the opposite to that in the USA.[28]

In a recent string of cases from the Swedish Supreme Court, this state of affairs has been challenged.[29] In short, it can be said that the Supreme Court for the first time applied Swedish criminal law to hate-speech law with specific regard to the European Convention on Human Rights (ECHR) Article 10.[30] The result has been controversial to say the least and sparked a debate on the role of courts in our constitutional system. The Supreme Court has namely applied the law narrowly, in direct contradiction of statements from the Parliament in the preparatory works dating back as late as from 2002. However, before we discuss the general impact of these cases on the limits of freedom of expression, I would like to point out some of the specific issues that were under consideration.

The first case was about the elderly Reverent Green, a conservative

[27] For example, blogs seem to be taking over from editorial pages as leading instruments of raising public opinion, but these are not covered by the Freedom of Expression Act.

[28] See cases Brandenburg v. Ohio 395 US 447 (1969) and RAV v City of St Paul, 505 US 377 (1992). For comparative analysis, see Barendt (supra, note 2), Rosenfeld, Hate Speech in Comparative Jurisprudence: A Comparative Analysis, 24 Cardozo L.R. 1523 (2002-2003), Knechtle, When to Regulate Hate Speech, 110 Penn. St. L.R. 539 (2005-2006) and Alford, Free Speech and the Case for Constitutional Exceptionalism, 106 Mich. L.R. 1071 (2007-2008).

[29] NJA 2005 p. 805, NJA 2006 p. 467 and NJA 2007 p. 805.

[30] In earlier cases, like NJA 1996 p. 577 and RH 1998:77, the Convention played a very limited role in the courts decisions.

Christian (in a Swedish context). He held a sermon on the theme of homosexuality and the Bible, in which he made some very negative comments on homosexuals as a group. The one that went furthest is probably the statement that "homosexuals are a cancer on society", something that could be interpreted as a threat, but that at the very least constituted a disregard for homosexuals. The district court held Green responsible for the crime of incitement to hatred on the basis of color of skin, religion or sexual orientation.[31] The Court of Appeal reversed it on the grounds that a conviction would be a too far-reaching limitation of religious freedom of expression and made references to the Swedish constitution as well as the European Convention. In the Supreme Court, the case was decided on the grounds that a conviction, however in line with the intentions of the legislator, would not be proportional and thus in breach of the ECHR. Article 10 of the European Convention played a dominant role in the Court's analysis and it was clear that what would otherwise have been an acceptable application of the criminal statute, in the Court's view could not live up to the European standard. Swedish criminal law had to be interpreted in the light of the Convention and this made the Court uphold the decision of the Court of Appeal. The decision was criticized on a number of grounds, but the ones of interest to us are the fear that it would open the way to all kinds of hate-speech under the cover of religion and that the Court overstepped its constitutional role in going directly against the legislators' clearly expressed will.

The next case, from 2006, was about a leaflet that two young men distributed in a high school. It contained a criticism of the education on sexual orientation, which was said to be dominated by homosexuals. Homosexuality was, among other things, said to be "unnatural" and "perverse" and juxtaposed with "other perversions" such as pedophilia in the leaflet. The men were convicted in the district court, but the Court of Appeal acquitted them with reference to the Green case. A divided (3 to 2) Supreme Court, put great emphasis on the case law of the European Court of Human Rights that stresses that freedom of expression must be used with regard to other people's feelings[32] and the fact that the school is a special environment where other restrictions on freedom of expression are acceptable than in society in general. To most observers, the old order was restored and Green was a special case, explained by its atypical

[31] A statute much like the one tried in the US case RAV (se note 28 supra).

[32] Citing the case Otto Preminger Institute

context (the sermon). The minority could not find that the environment itself was of importance and pointed out that the statements, however misinformed, were part of a debate on the content of education and no worse than the statements in the Green case. In the view of the minority, this kind of speech was better countered in an open debate, then in criminal proceedings.

So, when the Court in 2007 again handed down two decisions (gathered in the same case) that limited the application of the criminal statute, it was something of a surprise. The first (I) was about the content of a blog on a religious home page. The statements published there were quite scary; killing homosexuals to save them from sin was one of the ideas put forward. But the accused was not the author of these statements, only the administrator of the blog. According to a specific law on the publishing of some internet material,[33] the administrator of a blog has a legal responsibility to monitor the content of the blog and remove any material that is "manifestly" illegal. The issue was whether the accused should have realized that the statements were clearly within the criminalized area or not. The other (II) situation was also about the content of a homepage, but this time it was the homepage of right-wing extremist newspaper. That kind of material on the internet falls under the protection of the Freedom of Expression Act (*Yttrandefrihetsgrundlagen*),[34] so the special rules on procedure etc. mentioned above were applicable. The published material was about gypsies and homosexuals and generally critical and intolerant towards such groups. The lower courts convicted in the first case, but acquitted in the higher and some further guidance was clearly necessary.

Again the European Convention played an important role in the Court's argumentation and again the Court was deeply divided. Now however, the minority from 2006 was in the majority. The majority stressed that the decisions from 2006 were about expression in a special environment, one which is dedicated to education.[35] The Court also pointed out that in the 2006 case, nearly all students in the school

[33] That for technical reasons falls outside the protection of the Freedom of Expression Act, and thus can be regulated in ordinary law.

[34] Due to some technical issues, that we will not give more attention.

[35] An environment that is also treated as somewhat special in US jurisprudence, see Grayned v. City of Rockford, 408 US 104 (1972), Bethel School District No. 403 v. Fraser, 478 US 675 (1986), West Side Community Board of Education v. Mergens, 496 US 226 (1990) and Veronica School District 47J v. Acton (1995).

received the leaflet, willingly or otherwise, while in the 2005 and 2007 cases, receivers of the expressions in question had to take their own initiative in order to receive the message. Furthermore, the Court gave some importance to the fact that religion as such should not be given special treatment. Instead the Court stressed the need for a contextualized analysis, in which the religious background could be a factor, but not a decisive one.

The idea of right-wing extremists "hiding behind religion" was thus rebutted, but in a way that surely disappointed some, as right-wing extremist speech was treated on a par with religious expression. In its carefully balancing approach, the court closely followed case law from the European Court of Human Rights but had to tackle issues never decided upon by the Strasbourg Court. Otherwise, in Case (I) the Court gave some weight to the fact that after the decisions of 2005 and 2006, it would almost unrealistic to have high expectations on an individual to be able to find the expressions in question "manifestly" criminal. In Case (II) the Court stressed the special character of the Freedom of Expression Act and the carefulness it demanded from courts so that free debate would not be hampered unnecessarily.[36] In both cases the accused were acquitted.

7.2 Disregarding "disregard" and taking on a tough job

I would like to highlight two conclusions that can be drawn from these cases. The first regards the application of the Swedish criminal law and the "disregard" part of the crime "incitement on the grounds of color of skin, religion and sexual orientation". The Court's decisions must be understood as that the earlier interpretation of this in Swedish courts was going too far, limiting freedom of expression too much. This view might be contested, as the cases from 2005 and 2007 are both quite special. The first one is about a sermon and a religious context. The second is about a kind of subsidiary responsibility for other persons' expressions (I) and about an expression protected by the special constitutional Freedom of Expression Act (II). All of them might be viewed as exceptions in themselves, which would mean that the case from 2006 and earlier – quite far-reaching – cases are still "good law".

[36] The minority once again stressed that freedom of expression is to be used with good judgment and care for other people's feelings.

However compelling such an argument might be, I would not subscribe to it. First of all, the Court's division on the cases of 2006 and 2007 speaks of a greater difference of opinion than the technical explanation above can imply. The majority of 2007 does not accept the argument of a certain responsibility when using the freedom of expression and the way it argues, the "special" case is the one from 2006, as the 2007 majority places emphasis on the educational environment and the "captive audience" of students in that case.[37] Also, it would seem strange for the Supreme Court, with its function of giving guidance to the lower courts, to spend its time with legal questions at the fringe of the issues involved, while at the same time sending a message of status quo. The repeated acquittals are, in my view, better understood as a message to the lower courts that something new is afoot. And it is clear from the way the Court uses the Convention, that this change has something to do with the way the European Convention affects the application of Swedish criminal law.

Finally, it must be noted that the Supreme Court in these cases – if they are interpreted as a general move towards a more restrictive application of the criminalization – takes "ordinary law" closer to the practical application of the Freedom of Press and the Freedom of Expressions Act.[38] The differences between cases falling under the special protection of mass media and those that do not are reduced by these decisions, something that might make freedom of expression a more coherent and logical area of law as a whole. I would thus like to view the string of cases from 2005 to 2007 as a general "liberalization" of Swedish hate-speech law. There are also signs from the lower courts that this is the message they have heard.[39]

[37] In US jurisprudence the concept of "captive audience" has mainly been used in situations were someone has no choice but to suffer a message, for example in the context of noise close to home, etc, see Cohen v. California, 403 US 15 (1972) and Frisby v. Schultz, 487 US 474 (1988). The Swedish Court's analysis is not precisely comparable to that, but the idea that exposure to the ideas whether willing or not as a special factor in the freedom of expression analysis is akin to the "captive audience" argument, as I understand it.

[38] As mentioned above, the Chancellor of Justice is generally restrictive in bringing charges against someone on the basis of published material, not prosecuting religious magazines and other material for a long time even though they have contained material much more disregarding than what was on trial in the cases of 2005–2007 (of course Case II from 2007 was brought to court by the CoJ and that is in itself a bit surprising).

[39] See Svea Court of Appeal, case B 7166-07, judgement 2008-02-26 and the Skåne and

The second issue of interest to us here is the way the Swedish Supreme Court has had to use the European Convention "on its own", that is without any clear guidance from the case law of the Strasbourg Court. In a way this has had a constitutional impact, as Swedish courts by tradition have been very loyal to the legislature, trying their best to achieve the ends of any legislative product.[40] What we have is a case where the Government and the Parliament have considered the impact of the European Convention during the legislative process and found it possible to criminalize certain expressions. The fact that the Supreme Court finds to the contrary without clear support in the case law of the ECtHR is a bit revolutionary in the Swedish context.

This can in itself be a sign of two different things, worthy of some discussion. The first is a different constitutional position for Swedish courts, a change that comes with the influence of European law. In order to be able to question the legislation, courts need a "higher law" and Swedish constitutional law has traditionally not been that law. European law has an effect very similar to a federal legal system and provides national courts with that higher law. This is particularly evident in constitutional systems where courts have had little to do with control of the legislative branch of government.[41] The second is the way this has brought at least the Nordic higher courts into a convergent interpretation of the limits of freedom of expression.[42] The Supreme Courts of Sweden, Denmark, Norway, Iceland and Finland are well aware of each other's decisions and seek guidance from (but are of course not controlled by) that case law.[43]

Blekinge Court of Appeal, case B1729-07, judgement 2008-05-12 in which concern for freedom of expression had the courts reverse district court verdicts.

[40] This has provoked a long-standing and rather heated debate on judicial reverence towards the Parliament (Riksdagen), see for example Nergelius, 2005 – The Year When European Law and its Supremacy was Finally Acknowledged by Swedish Courts, in Bull/Cramér (eds.) Swedish Studies in European Law vol 2 (2008) pp. 145–157.

[41] Even more obvious than the Swedish example is the change in the British legal system brought about by the membership in the Union and the Human Rights Act of 1998. As British courts traditionally had no power to involve themselves with judicial review of Acts of Parliament, the impact of European law has been nothing less than a constitutional revision of the system of government in the UK:

[42] See Bull (supra, note 2) p. 351.

[43] Due to cultural and historical connections and closely related languages, a certain "communication" between these courts has always existed (in modern times), in many fields of law. Constitutional law has, however, been somewhat outside of that "sharing" experience as both Sweden and Finland has had different constitutional set-ups when

A "common law" of human rights might indeed be growing in – and in between – what is essentially continental legal systems.

What we see is a growth of quite independent interpretations of the Convention, something that the ECtHR has sought for a long time,[44] but that has the downside that it overthrows national constitutional arrangements regarding the relations between courts and legislators. Once again, the counter-majoritarian difficulty of judicial control of political institutions comes to the forefront of the discussion. How far can the Supreme Court judges in our region push the interpretation of the Convention before their legitimacy to do so is questioned? The debate in the wake of the decisions on hate speech in the Swedish Supreme Court might indicate that this limit has now been reached. If the Court wishes to proceed down the road of independent interpretation – something I regard as highly likely – we will see a debate in Sweden much like the one that has been going on in the USA for many years. So, even if the Convention might not bring US and European law closer in substance, it does put the European discussion on judicial review into a position that is very similar to the one in the USA.[45]

8 Openness or Loyalty?

8.1 An open administration

Swedish constitutional law has not managed to export as many of its concepts as German and US law has. Our legal tradition is a small one and our language is not well known around the world. But there are two institutions that we have had certain success with in "selling" to the world. The first and most well known is the Ombudsman.[46] The other is the Swedish system of openness and transparency in governmental

compared to the other three countries (see Husa, Guarding the Constitutionality of Laws in the Nordic Countries, 48 Am. J. Comp. L. 345 (2000).

[44] See Kulda v Poland, where the ECtHR states that the very system of the Convention demands that national courts takes the prime responsibility for controlling that the Convention is followed in law as well as in practice. The Strasbourg Court is presently overwhelmed by cases and needs to push that caseload back to the national systems.

[45] The US literature on the subject is vast. Some views that have made major impact are Bickel, The Least Dangerous Branch (1962), Ely, Democracy and Distrust (1980) and Bork, The Tempting of America (1991).

[46] Together with "smorgasbord", this is one of few Swedish words that have found its way into the English language. For a brief overview of the background and constitutional

administration. In a European context, this is something unusual, as the traditional way of viewing the inner workings of government has been to regard it as the private affairs of the King or Crown. Even after the spread of democracy (ending after WWII), this tradition has been strong. It is characterized by the attitude that documents and information on the inner workings of government are secret and only disclosed at the leisure of governmental officials. There is no "right" for citizens to have access to this information.

As already mentioned, the contrary is true in Swedish constitutional law. Based on the Freedom of Press Act of 1766, a right to access public documents was recognized very early on in Swedish administrative law. The rule is that public documents are accessible, and the exceptions to this rule must be carefully drawn and gathered in a single Secrecy Act.[47] It is forbidden to ask why a person wants to see a certain document and no other costs than those immediately connected to the disclosure of the document (i.e. copying) is allowed. Decisions to withhold information are subject to appeal in a court of law. The whole system of access to public documents is founded on a rather far-reaching regulation on the duty to keep informative records of any document arriving at or leaving any public authority and keeping these records public as well. One of Sweden's major ambitions in the work on a political system in the European Union has been to export this tradition of openness to the political and administrative institutions of the Union. This has so far been somewhat successful, even if change is taking place slowly.[48]

In Sweden this right to get information on the inner workings of the government and governmental authorities has always been closely connected with the idea of the Press as a watchdog of political power. It is journalists and critics of government that have special use for openness in the administration. From this perspective it is only natural that not only should the Press have access to documents, but also other information on how public power and public funds are being used. From this a broad

position of the Swedish Ombudsman, see Bull, The Original Ombudsman, 6 European Public Law 3 (2000), pp. 334–344.

[47] *Sekretesslagen*, SFS 1980:100.

[48] In the case-law of the European Court of Justice, Sweden has often taken part or Swedish people have been involved in just these kind of issues, pushing the legal development towards a "Swedish" approach to openness, see i.e. C-64/05 P, Kingdom of Sweden v. Council of the European Union, judgment 2007-12-18 and C-39/05 P, Kingdom of Sweden v. Council of the European Union, judgment 2008-07-01.

right for public employees to give the press information on these matters follows on logically. In the Freedom of Press Act, this is made concrete by the special right to be an informant of the press (*meddelarfrihet*).[49] Informants are protected by a number of constitutional provisions, some well known in other jurisdictions, such as the right to remain anonymous. But in Sweden this protection has been taken to another level. In the context of public administration, it is forbidden – and constitutionally sanctioned – to try to find out which employee is responsible for leaks to the press.[50] Furthermore, some of the limits to the Freedom of Expression of public employees that are common in other jurisdictions, such as restrictions on membership in political parties, organizations etc, are not allowed under the Swedish system.[51]

More than that, it is actually allowed to act in contravention to the Secrecy Act and expose information classified as "secret" *if* this is done in order to publicly discuss the workings of our administration. In practice this means that what you cannot tell your spouse, you can tell the press. And, furthermore, even in cases when someone acts as an open informant to the press or otherwise takes part in the public debate, the government (and its authorities) is forbidden to resort to any kind of reprisals against that person on the grounds of the expression or disclosure.[52]

Internationally, this broad right for public employees to inform the press or speak out themselves without fear of any sanction is quite unique.[53] Swedish constitutional law views the public employee as part of the machinery of public power to the extent that the employers' interest

[49] Actually, the right encompasses giving information to anyone with intent of making it public in a media covered by the Acts, and not only journalists as such.

[50] Crimes may be punished by prison, something that might be quite surprising for a senior administrative manager who has tried to uncover who leaked unflattering information to the media.

[51] For US, see Broadrick v. Oklahoma, 413 US 601 (1973) and Rankin v. McPerson, 483 US 378 (1987).

[52] This follows from a rather sophisticated interpretation of the Freedom of Press Act Ch. 1 § 3 and the principle of exclusivity (supra note 4): As no action may be taken against a person on the grounds of an expression in the media covered by the Act if there is no specific support for that action in the Act, no negative sanction may be enforced against an employee due to his or her expressions about their employer (the government). The Act does not include any rights for employers to sanction the employee for publications, information etc. and the principle of exclusivity rules out any sanctions on the basis of contract law, labor law or otherwise.

[53] See Barendt (supra note 2) pp. 108–112 and 193–197.

in loyalty and efficiency has had to give way to the idea of control of public power. Now, the reader should not think for a minute that this special constitutional framework is problem-free. Here I will only concentrate on two of the difficulties, namely the idea that only civil servants are protected by the special rules on whistle-blowing and the issue of what constitutes a "sanction" in the system of that protection.

8.2 As time goes by, Public goes Private

The constitutional protection of whistleblowers and other informants (mentioned above: anonymity, a right to disclose classified information, prohibition on trying to unveil the source and protection against sanctions) is wholly dependent upon the classical distinction between public and private. Only public employees enjoy the constitutional protection, as only they are intimately connected to the use of public power.

In 2005, the Chancellor of Justice, who has the task of guarding the rights in the Freedom of Press Act, brought charges against a high ranked official within local government for having acted in a way that was incompatible with the prohibition on sanctions for using one's freedom of speech.[54] A district court handed down a verdict in the case and their finding surprised many observers. The court first stated that criminal responsibility for breaching the prohibition in question was dependent upon whether the action of the official was regarded as a use of public power or as a measure taken within a contractual relationship – a private law issue. If the measures were only of a public nature, criminal responsibility was possible.[55]

Now, the system of protection of whistleblowers under the Freedom of Press Act is basically from 1949. The rules on criminal responsibility were from the 1970s. At both these times, there was no doubt that the relationship between local government and people employed there – was a public law relationship. A sanction taken by an official in local government against an employee was therefore an exercise of public power. Since then however, the court noted, the nature of the relationship between local government as an employer and its employees has changed. It has

[54] See Chancellor of Justice, decision 2005-10-24, dnr 3841-04-35.

[55] The Swedish Criminal Code, Ch. 20 § 1 criminalizes wrongdoing in public service, but connects this with the exercise of public power. Sanctions for other faults in public service should be handled as labor law cases, not criminal law issues.

been deregulated and basically turned into an "ordinary" contract between parties. Viewed this way, it was now difficult to say whether the action taken by the official should be regarded as an exercise of public power or not, but the court found that the strongest arguments supported the view that the private components of the relationship were dominant. Thus, criminal responsibility was out of the question. By a few strokes of the pen, the court did away with constitutional protection of over 400 000 potential whistle-blowers.[56] The CoJ did not appeal and it seems that the reasoning of the district court has also convinced the Government. The issue of criminal law protection of whistleblower in local government is now being considered by a public enquiry but it is unclear if anything will come out of that, and if it does, it will probably not be before the year 2011.[57] For at least six years employees in local government have had to wait for the right to speak out without fear for losing their jobs. A long time one might think …

8.3 The Nature of the Sanction

The second problematic issue with Swedish protection of whistleblowers I would like to discuss is one of definition. As mentioned above, the Freedom of Press Act prohibits reprisals that have no ground in the Act itself. Sacking someone for expressing their views in media is certainly something that is covered by the protection, by just how far does it go? Are measures such as lack of promotion, assignment to new (and less interesting) positions, open or indirect criticism of the employee, etc. also forbidden? These questions are not easy to answer and the institutions that have to assure that the administration respects to freedom of expression have somewhat different opinions on the matter.

The Chancellor of Justice (JK) has drawn the line by using the concept *of a concrete negative sanction*. By this the JK means that if it is shown that a certain action from the public employer is taken *because* an employee has used their freedom of expression and the action is *negative in a concrete* way, like loss of income, worse working hours etc, then it is

[56] The number of persons employed by local government in Sweden is 2/3 of the public employees in the country.

[57] See the proposal in the report SOU 2009:14, which should lead to a constitutional amendment that comes into force 2011, if nothing unexpected happens in the Parliament.

unconstitutional. Merely criticizing an employee, directly or indirectly, is for example not such a concrete sanction, as it has no specific negative consequences for the employee. The same goes for threatening with legal consequences of a certain kind, as long as no legal procedure is actually started. Instead, the JK has used a secondary analysis of such statements in order to discuss their appropriateness. While not constituting a breach of the constitutional protection of freedom of expression, such action might be *inappropriate* if it gives the employees the feeling that using their constitutional rights will be viewed negatively by the employer. Officials in the administration should therefore be restrictive in how they express their views on employees' contacts with media. One explanation for the Chancellor's rather restrictive view is that in cases where a breach of the constitutional protection has occurred, criminal sanctions might follow. It is of course important that there is a clear line between what constitutes a crime and what does not. By adopting the concrete negative sanction-approach, the JK has a tool for drawing that line with some consistency.

JK does leave open a certain area of legitimate criticism, holding that an administration must be able to have an internal dialogue on how the constitutional rights of the employees are used without that constituting a breach of those rights. The Chancellor has furthermore pointed out that the far-reaching freedom of public employees to inform media and express themselves therein is connected with a responsibility to use that freedom sensibly. If the right is misused, for example by selling media information for monetary gain alone, and this leads to the obstruction of the administrative or legal system, it might not be possible to keep this freedom in its current form. If the administration constantly leaks vital secret information, for reasons of personal gain, the situation will soon reach the limit of what is acceptable. Terms like "efficiency" and "decency" will take priority over "openness" in the public debate and the result may be that our long tradition of openness terminates itself.

Now, the other institution with the special task of guaranteeing that the administration respects the rights of the citizens is the Parliamentary Ombudsman (in Sweden most often called Justitieombudsmannen,[58] JO). JO has taken a somewhat different approach to the problem of which actions that can constitute a breach of the constitutional protec-

[58] The correct term is *Riksdagens ombudsman* (see Instrument of Government Ch. 12 § 6), but that is only used in statutory language.

tion of whistleblowers. Consistently, JO has held that even indirect criticism, expressing for example disappointment that certain information has reached the media, is unconstitutional. JO maintains that the only legitimate response of an administration that feels that its employees are giving the public a false picture of the administration is to publish contrary, correct information. Even careful expressions of criticism will, according to JO, lead to a climate where public employees know that it is better to be silent than to speak out, that contacts with journalists are not approved of, etc. In order to avoid that, which in time will lead to a decline of informed public debate, no criteria of concrete negative sanctions can be upheld when discussing the constitutionality of actions against informers.

We do not have any guiding decision from the courts on this issue, so the question of which perspective is the legally "correct" one is still in the balance. While understanding the more restrictive approach of JK – it is after all a question of criminal sanctions and misuse of the constitutional protection is not unheard of[59] – I do, however, feel that the view of JO is better in the long run. The inclination of most employees is not to embarrass their employer, and most people want to be proud (or at least not ashamed) of their workplace. And there are many subtle ways in which an employer can make the employees hesitant to use their freedom of expression in a critical way, regardless of what approach you take. Most legal disputes in this area are about whether actions taken by the employer were a reprisal for using freedom of speech, or if some other – legitimate – ground existed. Many times it is difficult to establish that the sole or main purpose of the action was to get back at someone for talking to the media or otherwise using their freedom of expression, or if there were other problems with the employee. Taken altogether, I feel that any opening for more subtle reprisals should be closed in order to give employees as much support as possible in using their constitutional rights. Because of this, the approach of JO is to be preferred. Public employees that secretly expose the inner workings of their administration or that are openly critical of the administration will probably never get much support from the employer and perhaps not even from fellow

[59] Just recently, a 2000-page long police investigation on a well-known murder in Sweden was made public on the internet, containing pictures of murdered children etc. The father of the children asked the publishers to take the pictures away, but they refused and referred to their constitutional rights of disclosure. The Minister of Justice has since – no surprise – expressed the view that the system might need an adjustment and that the Government will look into that question.

workers, families or communities. Troublemakers are little loved, sometimes for good reasons, sometimes not. In order not to make it even harder than it already is to speak out or to inform the media, the constitutional protection in Swedish law should be interpreted as also covering indirect reprisals and the like.

9 Conclusion

In the end, it must be noted that the Swedish system of protection of freedom of expression has some real challenges to confront. First of all, the influence of European law – and the European Convention in particular – is affecting how the boundaries of tolerance are drawn in Swedish law today. We are not wholly in command of that anymore and our courts have been given the difficult task of merging our traditions with the influence from the ECtHR. In the case of hate-speech this, as we have seen, has meant that we have in certain aspects been forced to adopt a more tolerant jurisprudence in practice. This has been obvious in the areas where the formal, technology-centered system of protection of freedom of expression has not reached. In this respect, the encounter with European law has been a story of more tolerance for the intolerant. For a long time Swedish self-understanding has been connected with the idea that we have the best-protected freedom of expression in the world.[60] That Europe had something to teach us was a surprise to many and it will not be the last one.

Secondly, we have seen a story of subtle change, where a protective constitutional framework has been sidestepped by changes in the way public employment is regarded. It is a significant example of how legal distinctions – however fictitious – still matter in the life of law. They control our minds and thus the world. In this field we have also encountered another limit to our tolerance of free speech, namely the function and legitimacy of the public administration. In Sweden public employees have been very free to inform the media or speak out themselves without any fear of reprisals, due to the constitutional protection of freedom of expression. We have seen that the tolerance of such openness is now under fire, as it is used more for personal gain and public gossip, than for informed debate and exposure of maladministration. Maybe the Swedish

[60] Likewise, we still like to think of ourselves as people from the country with good tennis-players and excellent cars.

tradition of the 18th century, the open administration, has reached its limit in the 21st century, where loyalty, efficiency and privacy are reasons to reduce openness? Our story thus concludes with a question, a fitting end for a story that never really ends – the ongoing Saga of the open society necessary for democracy.

Fred L. Morrison

Gustav III and *The Masked Ball*: Different Approaches to Freedom of Expression

In 1858 Giuseppi Verdi composed an opera which he originally entitled *Gustav III.* Its plot was a fictionalized version of the 1792 assassination of King Gustaf III of Sweden. You have never seen or heard that opera, because the censors in Naples and Rome banned its performance. It contemplated the unspeakable—regicide, the killing of a king. For the censors of the mid-nineteenth century there were concepts that could not be discussed in public. Killing a king—any king—was one of them.

Verdi was not to be deterred. He changed the locale, from Sweden to America, and he changed the victim, from the king of Sweden to the colonial governor of Boston. These two changes satisfied the censors and the revised work became famous the following year as *Un Ballo en Maschera, (The Masked Ball).* Now, 150 year later, King Gustav is again sometimes portrayed as the victim, although the unfortunate governor of Boston frequently still takes the part.

A quarter century before Verdi composed his masterpiece a French playwright, Eugène Scribe, wrote a play featuring the story of Gustav. Daniel Auber composed an opera based on the story, which he also called *Gustav III*. They were more fortunate than Verdi, because there was no censorship of the work in France. The Auber opera was quite successful until it was overtaken by the splendor of Verdi's work.

A word about poor King Gustav may be in order. He reigned from 1771 to 1792. He was a nephew of Frederick the Great of Prussia. Like his uncle, he sought to promote science, literature, and the arts and lively conversation about them. He established the Swedish Academy and built

the Stockholm Opera. He also tried to reestablish the absolute power of the monarch, seeking to undo the political liberties that had been recognized in Sweden earlier in the eighteenth century. He was shot at a masked ball by a group of noblemen and died 13 days later of an infection of the bullet wound. Unlike the protagonist in Verdi's story, he was not having an affair with another man's wife.

By Gustav's time Swedish law already recognized a limited freedom of the press. The *Tryckfrihetsförordningen,* enacted by his predecessor in 1766, was one of the first explicit protections of freedom of the press in the world, although the scope of its protection was limited. As an enlightened despot, Gustav welcomed discussion and debate about almost everything that wasn't political—but he continued to prohibit speech that was critical of the government or of the faith. On some matters, the public should not be misled.

One can wonder whether, if he had been living when Verdi wrote his magnificent opus, Gustav's love of grand opera would have led him to applaud the performance or his desire for autocratic control would have led him to ban it.

Verdi's problems in producing an opera that featured regicide may serve as a touchstone for the central issue of this paper. Are there thoughts that dare not be discussed or published? Are there ideas that are "too outrageous to mention"? European and American legal thought differ on this issue. European political and legal thought assumes that the wise state should protect foolish individuals from the most extreme of unsound ideas. Outrageous ideas, like regicide in the 19th century or genocide today, are beyond the pale. Some ideas, like denial of the existence of the Holocaust or disparagement of protected groups of people, are today thought to be so clearly wrong that their expression is prohibited in some countries. American polticial and legal though, in contrast, suggests that the foolish state should not prevent wise individuals from reaching their own sound conclusions. For Americans the remedy for bad speech is more speech to counter it. In the United States, the police must allow a Nazi demonstration to parade through the streets of a predominantly Jewish community[1]; they must allow a Ku Klux Klan rally to preach

[1] *Collin v Smith* 478 F2d 1197 (7th Circuit Court of Appeals), review denied 439 US 916 (1978).

their hideous racial hatred,[2] so long as it does not actually move someone physically to harm others.

There are multiple sources for this difference. European political thought is based on a more communitarian philosophy, the American is based on a more individualistic one. In Europe the promotion of a common culture is a major responsibility of government, encompassing education, artistic endeavors, and at one time even religious belief. In the United States, cultural affairs and arts are at best poor stepchildren of government support, and religion and the state have long been separated. Culture is left to grow or wilt on its own. Good ideas will flourish; bad ideas will simply fade away.

Much of European constitutionalism is also based on the supremacy of the national legislature. American constitutionalism is based on the supremacy of the constitutional rules. In their rebellion against absolute monarchs, the European people put trust in their elected representatives. Actions approved by the national legislature reflect the popular will. So in Europe restrictions on freedom of expression cannot be imposed by an executive decrees, but they can be enacted based on legislation enacted by the parliament. American constitutionalism distrusts the legislature as much as it distrusts the executive, so it makes freedom of expression an absolute. Europeans replaced the absolute king with the legislature. Americans replaced the absolute king with the law. Despite these differences, in most actual cases both American and European law would usually reach the same conclusion about most issues involving freedom of expression. They would only differ with respect to the "hard cases."

Both the European and American approaches have influenced the evolution of international instruments for the protection of human rights, especially the International Covenant on Civil and Political Rights. The text of that covenant nevertheless largely reflects the European approach. Despite the fact that the two approaches almost always reach the same result in fact, the theoretical difference has led to reservations in the United States ratification of the Covenant. It seems unlikely that this tiny, but fundamental, difference can be bridged. So while the Covenant may be influential in establishing common minimum standards, it will almost certainly not become the standard applicable in the United States.

[2] *Brandenburg v Ohio* 395 US 444 (1969).

Some historical background

The protection of freedom of expression did not appear as a legal doctrine until early in the eighteenth century. Earlier documents of a constitutional nature said little or nothing about it. *Magna Carta* (1215) is concerned with the property rights, the rights of the nobility and with procedural matters, but not with protection of expression. The English *Bill of Rights* (1689) only protected the freedom of speech within the Parliament and the right to petition the government.[3] It contained no general protection of free speech for the public.

Indeed, the Swedish *Tryckfrihetsförordningen* (1766) was one of the earliest steps to protect freedom of expression, but it only protected the printed word and did so largely through procedural means. In Gustav's time, it still allowed criminal prosecution of blasphemy and of criticism of the government.

The real impetus for broader protection of freedom of expression came from the revolutionary countries, France and the newly independent American colonies. But even there the support was initially muted. In France, the *Declaration of the Rights of Man and the Citizen,* adopted in 1789, reached the protection of expression only in its 11th article, and gave only a limited rights It provided

> La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi.

Note the final clause. The framers of the Declaration protected the right of free expression against any restrictions in the existing law, but they put complete trust in the legislative branch to craft new limits. The legislature could determine what was an abuse and simply prohibit it by enacting a law. There was no external constraint on its right to limit speech. Much of European constitutional development was based on curbing executive and monarchical power through a requirement of legislation, rather than on creating an absolute right for the people. The legislature, after all, represented the people.

In the American colonies at the time, freedom of expression was likewise frequently relegated to the end of any charter of liberties. While

[3] Bill of Rights, 1 W&M c 2.

it was included in many of the post-revolutionary constitutions of the new states, it was frequently tempered with an explicit recognition of the liabilities and responsibilities of the speaker.

Indeed, the original text of the United States Constitution contained no protection for freedom of expression at all. The authors appeared to believe that such a protection would be unnecessary since the new central government's powers were largely economic. It was only after delegates to some of the state conventions hesitated to ratify the new fundamental law because of this failure that amendments were promised. They took the form of the Bill of Rights, now the first ten amendments to the Constitution.

Here, again, the record is equivocal. In the proposed amendments submitted to the states, freedom of expression was only the third proposal. Two other proposed amendments, relating to the compensation of legislators and the number of members of the House of Representatives, were listed before it, but were rejected by the ratifying bodies. So the protection of speech and press moved forward from the third position on the list to become the First Amendment. In modern times, that precedence has sometimes given it a preeminence and greater authority than other provisions of the Constitution.

Freedom of expression in American law

The basic text protecting freedom of expression in American law is the First Amendment. It is surprisingly simple. Its full text says:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[4]

This simple text has created a broad protection for expression of all kinds. Its text imposes limits on Congress, but most of its protections have been extended to all branches of state and local governments.[5] One justice of the Supreme Court took this language very literally. Justice Hugo Black frequently stated that when the Constitution said that Congress could make "no law" restricting freedom of expression, it meant exactly what

[4] U.S. Constitution, Amendment I.

[5] *Gitlow v New York* 286 US 652 (1925).

it said. For him even a very reasonable law would be unconstitutional.[6] Legal doctrine has not gone so far.

American constitutional doctrine requires the government to satisfy a very high threshold to justify the punishment of any expression based on its content or argument. In *R.A.V. v City of St. Paul,* the Supreme Court declared that "Content-based regulations are presumptively invalid."[7] The *strict scrutiny standard* effectively prohibits virtually all *content-based* restrictions on freedom of expression. If a restriction on speech is based on the content of that communication, it must serve a compelling public purpose *and* it there must be no less restrictive means of accomplishing that purpose.[8] While this standard would appear to leave a loophole, it is an exceedingly tiny one. In another context the strict scrutiny rule has been described as "fatal in fact" to all governmental regulations that fall within its scope. Thus a government cannot prohibit protests disrespectful of a foreign government in front of its embassy,[9] or political picketing in front of a home,[10] or access to sexually oriented websites.[11]

In order for a content-based regulation on expression to be upheld, some other element must be present. The state can regulate expression that poses an imminent danger of grave harm, particularly grave physical harm, to others.[12] The mere communication of bad ideas is not enough to warrant governmental interference with the expression. Restriction is permitted only in a few other situations—and in each of them there is an additional substantive hurdle that the government must satisfy in order to justify its interest in suppressing the communication.

Incitement of others to imminent action may be punished if the action will occur in the near future and the danger it poses is grave. Oliver Wendell Holmes described this in 1919 when said that the law could prohibit someone from falsely shouting "Fire!" in a crowded theater.[13]

[6] *Konigsberg v State Ba*r 366 US 36 (1961) (dissenting opinion). His views led him to refuse to examine the evidence in cases involving obscenity, since, for him, all obscenity laws were restrictions on expression.

[7] 505 US 377 382 (1992).

[8] *Turner Broadcasting v FCC* 512 US 622 (1994).

[9] *Boos v Barry* 485 US 312 (1988).

[10] *Carey v Brown* 447 US 495 (1980).

[11] *Reno v American Civil Liberties Union* 321 US 844 (1997), *Ashcroft v. American Civil Liberties Union* 542 US 656 (2004).

[12] *Brandenburg v Ohio* 395 US 444 (1969).

[13] *Schenk v United States* 249 US 47, 52 (1919).

He articulated a "clear and present danger" test, in which he allowed the punishment of one who created a clear and present danger of substantive evil that the state is allowed to prohibit. The limiting factors here were to be found in the two adjectives attached to the test. The harm had to be "clear"; it could not be speculative. It also had to be "present"; it had to happen almost immediately.

A generation later, the Supreme Court modified this test in *Dennis v. United States,*[14] which involved the prosecution of leaders of the Communist Party during the early years of the Cold War. Quoting Judge Learned Hand from the Court of Appeals, it more carefully articulated the principle.

> In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.[15]

Again, however, the evil had to be a substantive harm, not simply the propagation of an idea.

The modern form of the test can be found in *Brandenburg v. Ohio*, in which the court said:

> "[the] mere abstract teaching [of] the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the freedoms granted by the First and Fourteenth Amendments.[16]

The test requires imminent harm, a likelihood of producing illegal action, and an intent to cause imminent injury. In *Brandenburg* the speech was made at a recruiting meeting for the Ku Klux Klan, a racist organization which has a long history of persecuting black citizens and other minorities. The meeting was conducted with a burning cross, hooded members of the order, and other indicia of the Klan. The speech, however, was simply a call on others to join its membership. No physical attacks on members of minority groups were planned that evening. There was no immediate physical threat to others. Advocacy of ideas is protected, but incitement to immediate action is not.

[14] 341 US 497 (1951).
[15] *Id* at 510.
[16] *Brandenburg* (n 12) at 448 (1969)

In sum, in the United States speech is punishable only when it amounts to the incitement of imminent physical action that would itself be punishable. So the agitator who incites members of a crowd to throw rocks through windows may be punished, even though he does not himself throw a rock, but the speaker who argues that some violent action is necessary in the future may not be punished. The test seems to be whether the speaker is indirectly controlling the physical actor's conduct. That test is very hard to satisfy.

In a few areas, the Supreme Court has also interpreted the Constitution as permitting limited restrictions on freedom of expression, but it has always done so with remarkable care. Two significant limitations are built into each of these exceptions. First, only regulation of a narrow sector of possible expression is permitted. Even collectively, these areas could not be used to reach political speech. Second, even if the speech falls within one of these categories, the state must satisfy a high standard to justify its action, even though it is not the strict scrutiny required to allow content-based restrictions. Space limitations permit them to be reviewed here only briefly.

One situation arises when expression is combined with some other form of physical activity, such as burning a flag in public to emphasize one's opposition to the government or to some government policy[17] or the wearing of an armband to show solidarity with some political position.[18] Here the Supreme Court has adopted a four-part test. A government regulation of the accompanying conduct can be upheld only (a) if it is within the general constitutional power of the government, (b) if it furthers an important or substantial governmental interest, (c) if that interest is unrelated to the suppression of expression, and (d) if the incidental restriction on freedom of expression is no greater than essential to the furtherance of the interest.

The Supreme Court has also limited First Amendment protection for advertisements and other forms of commercial speech. Under the modern form of that rule, speech that is primarily proposing a commercial transaction may be subject to regulation as provided in another four-part test, that asks: (a) Is the advertising false or deceptive or proposing illegal activities (in which case it may be regulated)? (b) Is the restriction justified by a substantial government interest? (c) Does the regulation directly advance

[17] *Texas v Johnson* 491 US 397 (1989).

[18] *Tinker v Des Moines Independent School District* 393 US 503 (1969).

that interest? and (d) Is it narrowly tailored to the purpose identified?[19] Advertisements for illegal activities can be prohibited; deceptive advertisements may be punished.[20] The remaining three elements, however, place a much heavier burden on the state to justify its regulation than they would need to satisfy to justify ordinary regulatory action. First, it must fall within a narrow category of commercial activity. Second, it must meet a heightened, albeit not a strict, scrutiny by showing a "substantial," rather than merely the "legitimate" governmental interest that is required for most public regulation. These are terms of art; the increase in the standard is significant. Some conduct that could be prohibited if it did not contain expressive content may not be prohibited if it is communicating an idea. The regulation must "directly" advance that interest; the addition of the adverb makes the test more strict than normal. The final element of the test, the requirement that it be "narrowly tailored" to the public need, is far more strict than the usual test which only requires that it be "related" to the public need.

Two other limitations on free expression involve sexually-oriented material. The first deals with obscenity, again a very narrow class of material. The government may prohibit the display or possession of obscene sexual materials. The Supreme Court has ruled that obscenity is unprotected expression, but has narrowly defined obscenity. The definition of obscenity can be found in *Miller v. California.*[21] A three part test is used: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. These standards mean that only a narrow range of work can be limited under this standard. It must appeal to sexual instincts, as parts (a) and (b) require. Indeed, part (b) limits the coverage of this exception solely to the depiction or description of sexual conduct. It also contains an exception protecting any works with literary, artistic, political or scientific or literary merit. Because community stan-

[19] *Central Hudson Gas & Electric Co. v Public Service Commission* 447 US 557 (1980), as modified by *Board of Trustees v Fox.* Fox 492 US 469 (1989).

[20] *Pittsburg Press v Pittsburg Commission of Human Rights* 413 US 371 (1973).

[21] 413 US 15 (1973).

dards have changed significantly over the years, only a very narrow body of work is now subject to restriction under this heading.

Expression that invokes sexual interest, but which does not reach the level defined by the test for obscenity, is thus part of protected speech. In some instances, children were used as models or actors in the production of such material. Congress and the states have prohibited the exploitation of children in this way. While the government could rely on the child labor laws to protect against this exploitation, that approach was frequently ineffective. Legislators, both state and federal, have extended the limitations to prohibit the sale, purchase, or possession of this material, on the theory that these activities contribute to the abuse of children in its production. The Supreme Court has upheld these laws on the theory that they are not related to the suppression of expression, but rather to the protection of the juveniles who were employed in the production of the material.[22] Note that, unlike the case of true obscenity where the law is attempting to protect the morals of the viewer, the moral interest being protected here is that of the child who participated in the making of the sexually suggestive production. Modern technology poses a problem for this line of cases, because it is now possible to produce virtual images without using any actual children. If no children are actually involved in the production of the item, the rationale for exceptional treatment disappears and only the much narrower obscenity category would seem to apply.[23] Here again, the law is permitting regulation, but only within a very narrowly defined category of cases.

American constitutional law also protects freedom of expression by placing strict limits on the law of defamation. If the plaintiff is a public official or public figure, he or she must show that the defendant utters the defamatory statement with knowledge that the statement was untrue or with reckless disregard of its truth, a standard that is almost impossible to meet.[24] Criminal prosecutions for defamation are also subject to the same stringent limitations, at least as regards the defamation of public officials and public officials and public figures.[25] America is a rough-and-tumble place in which verbal brawls are seen as normal. This standard is in sharp contrast to that prevailing in some parts of Europe,

[22] *New York v Ferber* 457 US 747 (1982).
[23] *Ashcroft v Free Speech Coalition* 535 US 234 (2002).
[24] *New York Times v Sullivan* 376 US 254 (1964) and subsequent cases.
[25] *Garrison v Louisiana* 379 US 64 (1964).

where the authors and editors of newspapers may be found criminally or civilly liable if they publish material that contains some untrue element. The European law generally gives greater weight to the right of the individual to protect his reputation and honor, while the American law gives precedence to the right of the speaker to comment on a public official or public figure.

European standards

Space does permit a close examination of European standards. Suffice it to say that European law permits much broader impingement on freedom of expression. A few examples can be briefly mentioned.

In some European countries denial of the Holocaust is a criminal offense. There have been a few widely publicized prosecutions. Holocaust denial makes no more sense than a claim that the earth is flat, but should the proponents of such absurdity be imprisoned—or ridiculed? The justification for such a ban seems to ride on the notion that those whose families were harmed or killed in the Holocaust will suffer emotional harm as a result of the mere words, but it is sometimes articulated in terms of a fear of a resurgence of future Nazi movements.

In other countries legislation prohibits speech that is merely offensive to others. In come countries there are laws prohibiting insults directed at foreign heads of state. In Sweden there has been a prosecution of a minister of religion for a sermon suggesting that homosexual conduct is wrong, because such a statement disparages individuals on the basis of their sexual orientation. The Swedish Supreme Court eventually overturned that conviction. Should the government punish beliefs—however wrongheaded—or should it concentrate its police actions on wrongful conduct? It is on issues like this that the American and European approaches diverge.

Another evidence of the difference is the much greater use of defamation litigation as a tool in political controversies. The European view is that legal process must be available to vindicate personal honor. The American view, discussed briefly above, is that one who enters the political fray or the public view must accept the "rough and tumble" of that debate, and that the law intervene only in the case of the most egregious falsehoods.

In sum, it seems clear that Europeans are more prepared than are Americans to suppress dissenting views on some controversial topics because of their emotive impact on other individuals.

Do International Standards Provide a Common Basis?

Can the standards provided in international instruments, such as the International Covenant on Civil and Political Rights,[26] provide a basis for a common view of such standards? The Covenant was concluded in 1967 and took effect nine years later. It was not ratified by the United States until 1992. The United States' hesitation was based in large part on the differences articulated above. Even when the United States did ratify the Covenant in 1992, it placed significant reservations and other limitations on its applicability, precisely because of its different approach. Even though those differences are present only in a miniscule fraction of the actual issues, they are so fundamental that they probably cannot be bridged.

Protection of freedom of expression is recognized in articles 19 and 20 of the Covenant. Article 19 provides:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom of seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

After recognizing freedom of expression in its first two paragraphs, the third paragraph of article 19 places obligations and restrictions on the communicators. Its first provision permits national law to continue to provide for liabilities of the press and other speakers for defamation and privacy invasions, even if the expression in question involved political or social controversy. This is much more restrictive on expression than the corresponding rules of *New York Times v. Sullivan*.[27] The second part of

[26] 999 UNTS 171.

[27] See above, note 24.

the exception allows the state to legislate to prohibit free expression in a broad range of situations: (a) national security, (b) public order (*ordre public)*, (c) public health and (d) morals. National security is a term that has elastic meaning, and could be used to argue that criticism of any national military activity was a danger to national security. The United States government once tried to use that argument to try to suppress the publication of the Pentagon Papers which revealed some of the decision-making leading to involvement in the Viet Nam War, but was unsuccessful in the Supreme Court.[28] The French concept of *ordre public* is very expansive and could probably justify a much broader range of curtailments of freedom of expression than the content-neutral rules of the First Amendment would allow. The permission of restrictive measures to protect public morals is clearly much broader than the very limited regulation of obscenity that is allowed under the Supreme Court's interpretation of the First Amendment.

The exceptions provided in article 20 of the Covenant are even more troubling. It provides:

> 1. Any propaganda for war shall be prohibited by law.
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

While war propaganda and racial and religious intolerance are reprehensible, there is a vast difference between overcoming them with more pacific or tolerant speech and simply suppressing them by the brute force of the legal system. Arguing against them, even ridiculing and disparaging them, is the way foreseen by the drafters of the American Bill of Rights. As is frequently said, "the remedy for bad speech is more speech." The European way is use the police and the prosecutor to suppress the debate. Article 20 clearly follows the European model.

These restrictions show that, in the eyes of the drafters of the Covenant, there are subjects and arguments that are simply unmentionable—just as regicide was in 19th century Italy. If you ignore those topics, and suppress any mention of them, they are supposed to go away. This is, of course, a vain hope. The Italian censors didn't stop regicide by banning an opera. Modern laws prohibiting the advocacy of genocide have not stopped those who would engage in ethnic cleansing.

[28] *United States v New York Times* 403 US 713 (1971).

While the United States participated in the drafting of the Covenant, it withheld ratification for a quarter century, in large part due to these two provisions. When it did ratify the document, it did so with significant reservations and other limitations. The political forces behind those reservations, largely the leadership of the press and other liberal elements, make it highly unlikely that there would be strong support for acceptance of the international standards as the internal law of the United States.

In its 1992 ratification of the Covenant the United States interposed five reservations, five understandings, four declarations and a proviso, an unusually large set of limitations.[29] The first declaration in the instrument of ratification limits the application of the Covenant in American law. It provides:

> That the United States declares that the provisions of article 1 through 27 of the Covenant are not self-executing.

This rather arcane statement has a simple meaning. In the United States treaties are ordinarily part of the supreme law of the land.[30] This declaration reverses that presumption. Even though most of the Covenant (except for those parts on which reservations have been filed) has become an international obligation of the United States, it has not become part of the internal law of the United States. In practical effect it means that the provisions of article 19(3), authorizing more restrictive legal measures against some forms of expression than are presently in force in the United States is inapplicable in the internal law of the United States.

The Supreme Court is unlikely to consider or apply Covenant standards in its interpretation of freedom of expression issues either for formal reasons (i.e., the declaration that the Covenant is non-self-executing) and for jurisprudential reasons (i.e., its increasing reluctance to cite foreign precedents). In a recent decision, it severely limited the effect that international instruments can have in domestic law.[31] Given that double barrier, it seems highly unlikely that Covenant standards will be incorporated into the interpretation of American protections of freedom of expression. The accumulated doctrine of the First Amendment will be applied instead.

[29] The text of the limitations and the Senate Committee report can be found at 31 ILM 645 (1992).

[30] U.S. Constitution, article VI, paragraph 2.

[31] Medellin v Texas, 552 US 491 (2008).

In addition, the first reservation provides:

> That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

This effectively eliminates article 20 from the United States' obligations under the Covenant. Almost everything required by article 20 is prohibited by the Constitution. This reservation was insisted upon by an unusual coalition of liberal and conservative forces. Liberal elements of the press were appalled by the content-based limitation article 20 potentially placed on their ability to discuss topics of their choice. They were concerned that it undermined the basic principles of the First Amendment. Protection of First Amendment rights is a matter of high principle for American journalists. At the same time, conservatives, always suspicious of international obligations, wished to be cautious about any binding international agreement that might impair constitutional freedoms. If the issue were to be raised again, that same unusual coalition would probably reemerge. It is unlikely that this reservation will be withdrawn or modified in the foreseeable future.

Some have argued that the Covenant has become customary international law. There may be some basis for this argument with respect to provisions as to which there has been no dissent in the international community, but it is unsustainable in the case of those provisions which have sparked the kind of reservation given above. In light of the American reservation, article 20 does not have the broad acceptance necessary to create customary international law.

The lone proviso additionally makes this point. It provides:

> Nothing in this Covenant requires or authorizes legislation or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

The proviso simply reemphasizes the point that, in case of a conflict between the Covenant and the United States Constitution, the Constitution will prevail in American law.

Conclusion

The standards articulated in the Covenant will not become a common global standard for the protection of freedom of expression. At least from the American perspective the protections afforded by article 19 are not sufficient, and the requirements of article 20 are objectionable. The Covenant provides minimum standards, but American law provides a broader and more robust protection for the speaker. That protection comes at a cost. The American standard presumes a society in which a more robust form of debate takes place.

It is important to reemphasize that in almost all cases, both the Covenant and the First Amendment would reach the same result. But in those few cases in which they would differ, the First Amendment would provide a broader protection of speech and press.

King Gustav would probably not have approved of the libertarian approach of the United States toward these issues. His was an Old World view, trying to reestablish an *ancien regieme*. The United States a more rough-and tumble New World place that does not accept that approach.

Maarit Jänterä-Jareborg

Family Law in a Multicultural Sweden – the challenges of migration and religion*

"it is reasonable to suppose that cultures that have provided the horizon of meaning for large numbers of human beings, of diverse characters and temperaments, over a long period of time – that have, in other words, articulated their sense of the good, the holy, the admirable – are almost certain to have something that deserves our admiration and respect, even if accompanied by much that we have to abhor and reject. Perhaps one could put it the other way: it would take a supreme arrogance to discount this possibility a priori"[1]

"one should seek to understand other people's ways of knowing the world, on their own terms, before passing judgment on them according to one's own moral or legal criteria."[2]

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See www.impactofreligion.uu.se

[1] Charles Taylor, et.al., Multiculturalism. Examining the Politics of Recognition, 1994, pp. 72–73.

[2] Annelise Riles, Cultural Conflicts, Transdisciplinary Conflict of Laws, Law and Contemporary Problems, Vol. 71, 2008, p. 275.

1 From a country of emigration to a country of immigration

1.1 Mass-scale emigration from Sweden to the New World

A natural point of departure for a contribution aimed at celebrating 25 years of cooperation between the Faculties of Law of Uppsala University, Sweden, and the University of Minnesota, USA, is an aspect of our common heritage, namely immigration from the Old World to the New. Between the mid-1800s and the 1930s, more than half of Sweden's population emigrated to the New World. Hundreds of thousands of Swedes found a new home in the USA, not least in Minnesota. Vilhelm Moberg's suite of four books, originally published between 1949–1959, describe the lives of the young farming couple Nilsson, from the famine in Småland, Southern Sweden, to the Indian lands of Minnesota, USA, where they settled in 1850. The husband Karl Oskar Nilsson (later Charles O. Nelson) welcomes the new hierarchy-free society from the bottom of his heart, where everybody is a Mr., a Mrs., or a Miss. His wife Kristina suffers from lifelong homesickness, also struggling with the new language but never learning it and missing the religious traditions of Sweden. This suite of books was voted in the 1990s as Sweden's most influential work of literature in the 20th century. Its narrative continues to engage us, and gives us a perspective on the problems encountered today by the new immigrants to *Sweden*.

1.2 Successive societal developments in Sweden

The Sweden of today is profoundly different from the poor farming country that the Nilssons, in the first volume of Moberg's suite, left for a new life in Minnesota. In a comparatively short space of time, slowly starting from the late 1800s, Sweden has developed into an advanced, post-industrial society with an emphasis on secular-rationalism and self-expression.[3] Today, Sweden scores highly on a wide range of international indicators, such as standard of living, longevity, gender equality, well-being and well-functioning democratic institutions.[4] Individu-

[3] See Introduction, *Application of Uppsala University to the Swedish Research Council for Granting a Linneaus Center of Excellence for the Research Program Impact of Religion: Challenges for Society, Law and Democracy.*

[4] Ibid.

al autonomy and human rights constitute the core values. Although a clear majority of the population still belong to Sweden's former (until 2000) State Church "Church of Sweden" (Protestant Lutheran),[5] religion seemed to have gradually disappeared from the public sphere of life and become a largely invisible "private matter". In recent years, however, religion is being increasingly manifested publicly, as a sequel to immigration into Sweden. It has received a new kind of visibility, through, for example, newly built mosques and religiously articulated dressing codes, celebration of Ramada, and, increasingly, the founding of schools with a religious curriculum.

1.3 Sweden as the country of destination: work force and refugees

Immigration into Sweden started in the years around the Second World War. As one of the few European countries that had managed to remain "neutral" during the war, Sweden became a refuge for many people fleeing from the neighboring countries directly involved in the war. Afterwards, the country's industry blossomed, demanding workers from abroad. Finns, Yugoslavs, Italians, Greeks and Turks arrived, and many stayed once their families had joined them. During the last few decades, Sweden's immigration politics have shifted from recruiting workers, the local supply being basically sufficient, to providing a refuge for those most in need of protection for political or humanitarian reasons. As a result, a clear majority of the more recent immigrants to Sweden come from politically unstable countries that are also geographically and culturally distant. Iranians, and more recently, Iraqi and Somali refugees became the largest immigrant groups arriving from outside the Nordic countries.[6] This immigration has carried with it other cultures, traditions and religions to Sweden. A notable change is, not least, the new

[5] The State and the church (= Church of Sweden) were legally fully separated only from 1 January 2000. Until then the Church of Sweden was Sweden's state church. In all the other Nordic States, the Protestant Lutheran Church has still the status of "State Church".

[6] Statistics from 2007 show that 15 200 persons arrived that year from Iraq and 3 781 from Somalia, constituting the largest groups of persons arriving from outside the Nordic states. Altogether 99 485 persons arrived that year, of whom almost 16 000 were Swedish citizens returning home. Citizens from the other Nordic countries amounted to 10 464 persons. Source: Wikipedia/Invandring. – In particular after the creation of a joint Nor-

presence of Islam and Muslims in Sweden, with Islam having become Sweden's second largest faith, after the Church of Sweden.

Of Sweden's population of 9.2 million inhabitants (2008), 1.5 million were either born abroad or in Sweden to two foreign-born parents. If regard is paid to only one parent's foreign birth, 2.2 million inhabitants are of foreign origin (in part). Approximately 250 000 to 400 000 are estimated to be Muslims.[7] In evaluating the impact of Sweden's transformation from a country of emigration into a country of immigration – and the tensions this transformation has caused, it needs to be borne in mind that only half a century back Sweden, as regards its population, was an ethnically homogeneous country, with a clear Lutheran heritage.[8]

2 The focus and aim of this contribution

2.1 The Swedish notion of multiculture

Until recently Swedish politicians liked to describe Sweden as a "multicultural society", i.e., a society with several co-existing cultures. What was implied was a society that recognizes differences, if the differences are founded on such factors as national or ethnic origin, language, religion, gender, or sexual orientation. Such an understanding of multiculture recognizes not only the various origins of the population, in particular through immigration from distant countries, but also the fact that people have different identities and notions concerning the good life.

dic labor market in 1955, mobility among the Nordic countries (Sweden, Denmark, Finland, Iceland and Norway) is common.

[7] No statistics are available in Sweden regarding a person's faith. It follows that any estimation of the numbers of Muslims in Sweden is inaccurate. Nor is it self-evident who counts as a Muslim – a believer or a person born to a Muslim family? The fact that a person is born in a predominantly Muslim state is not sufficient. Research regarding the numbers of Muslims in Sweden, on the basis of the new inhabitants' countries of origin, has been undertaken by Mosa Sayed in his forthcoming LLD thesis (in Swedish) on (preliminary title) "Islam and Rights of Inheritance in The Multi-cultural Sweden" (Iustus Förlag 2009, Uppsala).

[8] For reasons such as state church membership and the popularity of the rites of passage among the members, Sweden – and the other Nordic countries – is often called "the Nordic exception" in the sociology of religion. See Anders Bäckström, Ninna Edgardh Beckman, and Per Pettersson, Religious Change in Northern Europe, 2004, pp. 86–113. – The industrious spirit of Sweden and the discipline of the population as regards duty – "work-before-pleasure attitude" – are commonly seen as expressions of the Swedish society's "Lutheran heritage".

Today, one can sense a greater caution in the political rhetoric. There is an increasing awareness that multiculture is not only about demographics, gender or equal rights irrespective of one's sexual orientation. As elsewhere in Europe, there is a growing concern in Sweden that the population includes groups that do not identify themselves with "Swedish values", for example in the sphere of family life. To what extent should this be recognized, and to what extent should limits be set? Recognition of differences and issues of identity (in particular when defined in terms of religion) have turned out to be complex. Politics of universalism, that so far have set the official goal, and the politics of difference now-requested seem to be in conflict. Whereas the *politics of universalism* emphasize the equal dignity of all citizens, enjoying equal rights and entitlements, *politics of difference* focus on the unique identity of an individual or a group, i.e., their distinctness from everyone else, and demand recognition and equal status for all cultures.[9] All cultures should, in other words, be recognized as being of equal value.

In Sweden, a more general legal discourse concerning the challenges of multiculture – or recognition and identity – has not yet taken place.[10] The legal measures with a clear multicultural message have been of a piecemeal character, focusing on topical problematic issues such as honor killings or forced marriages. Questions such as whether alternative dispute mechanisms should be recognized, for example in the form of a Sharia council, have not reached the political agenda.[11] A probable explanation is that since the transformation from an all-level homogeneous society to a multicultural society took place very rapidly, the legal actors, such as the legislator, courts and legal scholars, lack the necessary knowledge and insight of the need to analyze and develop tools for the new situation

[9] These definitions are, largely, based on Charles Taylor's concepts, as defined in his (et al.) work Multiculturalism. Examining the Politics of Recognition, 1994.

[10] One of the first major contributions in the Swedish legal literature will be Sayed's above-mentioned LLD thesis, ibid. note 7.

[11] In this respect, Ontario, Canada has been in the forefront of development. Ontario's Arbitration Act was amended in 1991, allowing "faith-based arbitration". This made it possible for Muslims, Jews, Catholics and members of other faiths to use the guiding principles of their own religion to settle family law disputes outside the court system. Furthermore, Ontario has considered the establishment of a Muslim Arbitration Tribunal. A proposal to this end, permitting continued faith-based arbitration, by the former Advocate General Marion Boyd has, however, been rejected, the main argument being the importance of having one law only for all Ontarians.

and its challenges. The minority groups, in turn, are in many cases not organized enough to make demands for autonomy. When it turned out that the workforce recruited to Sweden aimed to stay (see above, Section 1.2), it was taken more or less for granted that the new groups would assimilate or at least integrate into Swedish society. Equally it was taken for granted that the new inhabitants expected to be subject to Swedish law in all respects.

2.2 Private international law as a multicultural tool

Both assimilation and integration imply a "melting" into the new society, i.e., that the new inhabitants become an integral part of it. Sweden's *rules of private international law* served as a kind of a bridge in this process, drawing the borderline between situations governed by the laws of the immigrants' country of origin and situations requiring application of Swedish law. Once the immigrant has crossed the bridge – by acquiring Swedish citizenship or by becoming domiciled (habitually resident) in Sweden – the laws of the states of origin no longer applied but were replaced by the application of Swedish law.

In Sweden, special rules on *choice of law* are applied to cases with cross-border connections. These rules are mainly statutory and form part of a field of law called *private international law*. Depending on the connecting factor of a case to a foreign jurisdiction, such as a party's (existing!) foreign domicile or foreign nationality, the rules on choice of law may refer to a foreign law, instead of Swedish law. For example the law applicable to matrimonial property relations is decided on the basis of the spouses' habitual residence, unless the spouses have otherwise agreed.[12] If the habitual residence is abroad, it is the court's obligation to examine any claim in accordance with the domestic law of that foreign state. This law may be of a religious origin, for example if it is closely linked with the Koran and Islam, or with Canon Law. To be applicable in a Swedish court the foreign law must, however, apply as the law of a nation-state. Sharia or Canon Law does not on its own constitute applicable "foreign law".

[12] Act (1990:272) on International Issues Concerning Spouses' and Cohabitees' Property Relations, 4 §. It should be noted that this enactment endorses party autonomy, granting the parties the right to choose the applicable law themselves, although within a limited number of jurisdictions with a close relation to at least one of the parties at the time of the agreement.

When a choice of law rule refers to foreign law, the foreign law is in all procedural aspects treated as law by a Swedish court, and not as a fact. The applicable foreign law is interchangeable in relation to Swedish law, the underlying assumption being the equivalence of foreign and domestic law. Due to the situation's transfrontier character, the law of the forum cannot claim exclusivity or preference of application, but only the same treatment as any foreign law. This outlook on choice of law in transfrontier situations dominates the whole European continent.[13]

2.3 When citizens' relate to something other than "the law of the land"

It is only recently, and mainly with the Muslim immigration into Sweden, that the impact of multiculture on matters of family law has become visible and an object of public debate. Allegedly, many of the new Swedes wish to conduct their private and family lives in accordance with religious values and traditions that derive from their country of origin and which may conflict with Swedish law. Once the individuals concerned have become Swedish citizens with residence in Sweden, such preferences can no longer be justified by reference to the rules of private international law. Concerns of accommodation arise. The growing importance of human rights and basic freedoms in Sweden (and Europe in general) both supports the individuals' right to choose their way of living and puts limits on the choices. Consequently, human rights law provides a useful point of reference for courts struggling with issues of pluralism, religion and family law.[14]

To date, informal "Sharia" courts or councils have not existed in Sweden. Still, the religious leaders of local Muslim communities – the Imams – play an important counseling role not least in family matters, and may also influence the members' notion of what Islam is and what religion requires in various legally relevant contexts. The background of these religious leaders in Sweden varies a lot, but many are reported to

[13] See Maarit Jänterä-Jareborg, Foreign Law in National Courts, A Comparative Perspective, Recueil des Cours 2003 (Vol. 304).

[14] See Ann Laquer Estin, Toward a Multicultural Family law, The Multi-Cultural Family (Ed. Laquer Estin), 2008, pp. 30–31.

have insufficient knowledge of the Swedish language, the laws of Sweden and Swedish society as such.[15]

The issue of citizens relating to something other than "the law of the land" alone is topical not only in Sweden but also in other European Union member states. To enter into any public debate in favor of the inclusion of religiously-influenced norms is also a minefield, as reactions to a public lecture given by the Head of the Church of England, Dr. Rowan Williams (Archbishop of Canterbury) in February 2008[16] clearly demonstrated. Williams pleaded for taking religion seriously in England and for including it in the construction of modern society, as an instrument for social cohesion. According to Williams, religion and in particular Islam is a challenge not least to family law, considering the important role it plays in the daily lives of many people. According to Williams, people can be true both in their faith and in their role as a citizen of a secular state, on condition that there is inclusion (also of religious norms), i.e., recognition. Only then can one achieve "an active citizenship". In July 2008, also Britain's most senior judge Lord Chief Justice Lord Phillips expressed sympathy for the idea of applying Islamic legal principles to Muslims in some parts of the legal system, for example matrimonial law, within the framework of agreed mediation or alternative dispute resolution.[17]

Storms of protest have followed both contributions, i.a., on the grounds that if carried out, suggestions like this would threaten the very foundations of the British society. Equality before the law is as stake, as women could be disadvantaged in supposedly voluntary "Sharia" deals. The Archbishop is also accused of using the new groups to give legitimacy to religion and to strengthen its role. It should be noted that both debat-

[15] See the report of the special committee, appointed by the Swedish government, to investigate whether the State should provide access to a specially drafted education aimed for leaders of the Muslim communities, Staten och imamerna, Religion, integration, autonomi, SOU 2009:52, p. 12. – It is not unusual that an Imam is recruited from another country to serve a Muslim community in Sweden, without any previous knowledge of Sweden.

[16] Islam in English Law. Civil and Religious Law in England – Lecture by the Archbishop of Canterbury, Dr. Rowan Williams. Lambeth Palace, 7 February 2008.

[17] Equality Before the Law. Speech by Lord Phillips, Lord Chief Justice. East London Muslim Centre, 3 July 2008. – According to some media commentators, parts of the Lord Chief Justice's speech can be described as a "more coherent version" of what the Archbishop tried to say.

ers focused on out-of-court dispute resolution, and voluntary adherence to Islamic family law. In case of disagreement, any "religiously-biased" family law dispute can be taken to civil courts.

2.4 Demarcations

This contribution aims to focus attention on the challenges of multiculture, through immigration and religion. I share the notion of, e.g., Tariq Madood, according to whom "the novelty of contemporary multiculturalism is that it introduces into western nation-states a kind of ethno-religious mix that is relatively unusual for those states, especially for western European states".[18] This notion explains also my choice of perspective. In the light of the public discussion in Sweden, it is evident that religion's new visibility and impact creates confusion and uncertainty regarding "what is what" and the proper response. It is not clear where the borderline goes between "religion", covered by the constitutionally protected freedom of religion, and, for example, merely patriarchal traditions that are not protected. Potential conflicts between religion and citizens' equality before the law create additional confusion.

I will use areas of family law as examples, namely the law of marriage, divorce and child custody. As illustrated by the British debate, family law is of particular concern in any truly multicultural context. Family law has special "cultural constraints", which will be highlighted below in Section 3. Attention will then be drawn in Sections 4 and 5 to (a) to what extent the Swedish legal system in the chosen areas recognizes – or fails to recognize[19] – legal diversity, and (b) concerns where the line should be drawn for the exclusiveness of forum law, i.e., the mandatory application of Swedish law. Whereas the surveys concerning the conditions for marriage and the right to divorce describe the Swedish concerns and developments more in detail, in respect of child custody (Section 6), I will tentatively identify certain difficult issues which in my opinion require further attention, not only from the legal actors but also from the parents.

[18] See Tariq Modood, Multiculturalism. A Civic Idea, 2007, p. 8.

[19] This response is, increasingly, called "misrecognition".

3 The "cultural constraints" of family law

3.1 Family law as the crux of the society and an expression of morality

Of all fields of law, family law is traditionally regarded as the "culturally most constrained" or "introverted" field of law, shaped in each nation-state by the country's history, culture, religion, prevailing social and political conditions, etc.[20] As the Belgian family law scholar and comparatist Marie-Thérèse Meulders-Klein puts it, the values with which family law is charged, as well as its role in the attribution of legal personality, bonds of kinship, the identity and the personal status of the individual and the ways families are structured, "place family law in the very crux of society in every country".[21] Meulders-Klein, further, emphasizes

> "that every nation has an interest in keeping a close eye on its law regarding the status of the individual and the family which, being a *matter of public policy*, is off-limits, *d'ordre public et indisponible*, and mostly placed under the protection of the national Constitutions".[22]

According to the Norwegian scholar in private international law Helge Johan Thue, family law is to be seen not only as an expression of a (nation-state's) culture, but also as the basis of each individual's self-conception. It follows, that it is not suited for any kind of external pressure, e.g., attempts at harmonization.[23]

A further special trait of family law is its alleged moral dimension. For example, the influential 19th century German scholar Friedrich Carl von Savigny classified family law as a predominantly moral institution.[24] Although the role of morality has decreased considerably in the western family law systems, in particular since the 1960s, it still has an impact on family law. How extensive this influence is and how deep it goes, as well as notions of morality may, nevertheless, vary considerably from

[20] See, e.g., Masha Antokolskaia, Introduction, Convergence and Divergence of Family Law in Europe, 2007, pp. 1–8.

[21] Marie-Thérèse Meulders-Klein, Towards a Uniform European Family Law? A Political Approach, Convergence and Divergence of Family Law in Europe, 2007, pp. 272–273.

[22] Ibid., p. 273.

[23] See Helge Johan Thue, Europeisk familierett – uniformering eller toleranse?, Globalisering og familieret, 2004, pp. 120–123.

[24] See Markku Helin, Perheoikeuden siveellisestä luonteesta, Lakimies 2004.

nation-state to nation-state. The same questions can be posed in relation to religion's impact on law.[25] Religion and morality also seem to be intertwined. For example, in the fairly new member state to the European Union, Malta, opposition to divorce, same-sex marriage and abortion (all forbidden), finds support in both.

3.2 Swedish developments – towards a "secular" outlook on family matters

In the past, family law in Sweden was intimately connected with religion and religious outlooks.[26] The legal validity of a marriage was, as a rule, linked to a religious marriage ceremony which constituted a life-long, undissolvable union between a man and a woman. Since the early 1900s, however, Swedish family law has developed in a secular direction and is regarded as internationally "progressive" and "women-friendly" – and in the forefront of European development. It is based on the notions of secularism, liberalism and equal rights for men and women. In addition, and probably more explicitly than anywhere else, legislation on family law has been used in Sweden as an instrument for "social engineering", to dispel tensions between new societal values and the values expressed in (allegedly out-of-date) legislation or, on the contrary, to steer societal values in a direction desired by the legislator.

An often quoted example, which in fact mixes both of these approaches, is Sweden's divorce legislation of 1973 which abolished guilt and the irretrievable breakdown of marriage as divorce grounds, making a spouse's wish to dissolve the marriage alone sufficient for applying, and granting, divorce. The legislator also abstained from giving marriage a higher ranking than cohabitation outside of marriage, which by that time had already become very common in Sweden whereas marriage rates had dropped. These positions were supported by referring to the necessity of abstaining from any value judgements regarding societal developments and individual behavior, and the need to rely upon the individuals' ability and responsibility to shape their own lives.[27] Respecting the individual's

[25] What is "religion" and what is "morality" may also overlap.

[26] A reader of Vilhelm Moberg's suite (Section 1 above), in particular in the first volume, is struck by the influence the Swedish state church exercised on the everyday lives of the Swedes in late 19th century.

[27] In connection with the law reforms carried out in the early 1970s it was emphasized that "new legislation should as far as possible remain neutral in relation to different forms

autonomy, and remaining neutral regarding the "good life" became the Swedish legislator's concept in the field of family law.

> It may be appropriate to remind a US reader that the legal system of Sweden belongs to the civil law family, statutory law (= legislation) being the primary source of law. In the application of the legislation, guidance is primarily sought in the *travaux préparatoires* preceding the enactment, in particular the Government Bill. The impact of case law remains casuistic and limited in time. When new developments in society call for change, or case law has developed in a direction considered undesirable, legislation is the instrument to be used.

3.3 The impact of the European Union on Swedish law

On the other hand, legislation and other legal sources in Sweden are no longer predominantly of Swedish origin, but originate to a great extent from the European Union which Sweden joined in 1995.[28] If in conflict with the national law, the community rules take precedence. Domestic family law – due to its "cultural constraints" – is among those few areas of law that still remain within the domain of each EU member state's legislative sovereignty. Cross-border family law measures, on the other hand, are within the EU's legislative competence, and are used by the Community legislator to promote the citizens' mobility within the member states' territories. Several EU regulations have been enacted in the field of international family law. Generally speaking, they take precedence not only in relation to national law but also in relation to international conventions to which member states are parties.

3.4 The challenges and the tools

The cultural constraints of family law raise difficult issues. If, on the one hand, family law is intimately linked with a person's or a group's cultural identity, then that person or group may wish to carry that law with him or her/the group everywhere. As Charles Taylor puts it, due to multi-

of cohabitation and to different moral concepts". Furthermore, "provisions concerning married individuals should be drafted in such a manner as to make it possible for each spouse to retain a large measure of independence during marriage". See the Committee Report of the legislative committee (Familjelagssakkunniga), SOU 1972:41, Familj och äktenskap I.

[28] To date (2009), the European Union has 27 member states.

national migration more and more of the members of a society live the life of the diaspora, whose center is elsewhere.[29] But on the other hand, from society's point of view, family law may at least in certain fields be an indispensable instrument for controlling and steering societal behavior. Evidently, these two aspirations may be in conflict. In the contemporary debate about multiculturalism, the demand – and the alleged solution – is the recognition of the equal value of different cultures. But as emphasized by Taylor, the equal worth of cultures can only count as a presumption and requires comparative cultural studies, and a willingness to be open to other cultures, before any real position can be taken.[30] I share Taylor's concern.

A further complication relates to drawing a line between an individual's rights and autonomy, and group pressure. The English family law professor Penny Booth pinpoints the problem candidly:

> "The danger is in the development of a parallel system of (any) law where the choice as to which system or principle is used is determined not by the individual or the issue but by the *group bullies*. In family law this danger could arise where the determination of system and approach is not made by the woman but the man: not through the female but through the male-dominated system. Trouble arises where principles integral to a conception of justice require subservience to a particular approach in law which itself favours one sex or group over another."[31]

In Sweden, private international law is currently the main tool for recognizing other cultures in the field of family law. This is also the general continental European approach. Consequently, if a situation does not qualify as transfrontier, the scope for recognizing anything else than the majority culture, as dictated by the "law of the land", is limited. In fact, the Swedish responses to multiculture outside of a purely Swedish value context[32] have mainly consisted of combating diversity. The law of mar-

[29] Charles Taylor, et.al., Multiculturalism. Examining the Politics of Recognition, 1994, p. 63.

[30] Ibid., pp. 72–73. – According to Ann Laquer Estin, "the multicultural family navigates a complicated balance of tradition and change, home and diaspora, community and autonomy", The Multi-Cultural Family (ed. Laquer Estin), p. xi.

[31] Penny Booth, Judging Sharia, Family Law Journal 2008. Emphasis added.

[32] Legal pluralism exists in a "purely Swedish value context" in form of a special legislation for cohabitation outside of marriage for the protection of the weaker party, the access to registered partnership for same-sex couples and, since 1 May 2009, the extension of the institution of marriage to same-sex couples.

riage and divorce, described in the following Sections 4 and 5, offers illuminating examples of this. For this reason, the headings of both Sections refer to combating multiculture.

4 Combating multiculture – the case of child marriages and forced marriages

4.1 Marriages celebrated in Sweden

In 2004 new legislation, aimed at protecting the individual against compelled or premature marriages, entered into force in Sweden.[33] Through the law reform application of Swedish law became obligatory whenever a marriage takes place in Sweden, the aim being to safeguard the voluntary nature of every marriage and that both parties are adults. The reform's multi-cultural implications are obvious. Forced marriages and child marriages are, namely, in Swedish society connected with immigration into Sweden from countries with another outlook on marriage, the rights of the individual and the child, as well as on gender equality. However, these issues are of concern also in respect of certain ethnic communities that have lived in Sweden for generations, for example Swedish Romanies.

> Forced marriages are marriages to which at least one of the parties was compelled. In a child marriage, at least one of the parties was under the age of eighteen (i.e. the age of majority and of marriage in Sweden) at the time of the marriage. Forced marriages and child marriages coincide when the compelled person was a minor at the time of the marriage.

The 2004 law reform was preceded by an intensive media attention focusing on so-called honor killings of young immigrant women living in Sweden.[34] The incentive for these murders, committed by the father or the

[33] The new legislation consists mainly of amendments in the Swedish Act on Certain International Legal Relationships on Marriage and Guardianship (1904:26, p. 1) and the Swedish Marriage Code (1987:230). This amendment is also commented upon by Åke Saldeen, Sweden: Legislation on Forced Marriage and Intercountry Adoption, The International Survey of Family Law, 2006, pp. 439–441.

[34] See Maarit Jänterä-Jareborg, Combating Child Marriages and Forced Marriages – the Prospects of the Hague Marriage Convention in the Scandinavian 'Multicultural' Societies, Intercontinental Cooperation through Private International Law, Essays in Memory of Peter E. Nygh, 2004, pp. 163–175; Göran Lambertz, 'Honour Killings' and Their

brother of the young woman, was her refusal to marry a man chosen for her by her family and/or her desire to lead an independent life, including the right to have a boyfriend and to choose a spouse. A shock wave passed through Swedish society, demanding measures to safeguard every person's fundamental right to shape her own life according to her will and ability, or, on the contrary, "not to make a fuss". The debate went as follows:

> Are we dealing with oppressive foreign traditions lacking counterparts in the western society? In that case, we must not close our eyes to the every day lives of many immigrant families in Sweden, but must take measures to protect the victims, i.a., through legislation. Or is it a question of yet another expression of patriarchal suppression of women, comparable to the well-known western phenomenon of domestic violence and wife-beating? If so, we should not lose our sense of proportion and not take measures labeling foreign traditions as inferior to our own.[35]

More recently, a young Afghan man faced a similar fate, after an engagement to a young Afghan woman against the will of her family. By brutally killing the young man, the young woman's family re-established a "status quo". In this case, as well as in the other cases of honor killings, both the victim and the perpetrator of the crime were domiciled in Sweden and were in many of the cases, naturalized citizens of Sweden. Both examples demonstrate brutal patriarchal traditions and should not be attributed to religion or its impact.

Until the 2004 amendment, the starting point in Swedish law was to examine each person's right to marry according to his or her national law (= *lex patriae*). Considering the number of foreign citizens residing in Sweden, the application of foreign law was common. Since the marriage age in many countries around the Mediterranean and the Middle East is lower than in Sweden, also child marriages were permitted. A limit applied to children *under the age of fifteen years* (!), in which case a special permit by the competent Swedish authority was required for the marriage, even if the marriage was permitted under the child's national law.

Export to the West, Family Life and Human Rights, Papers Presented at the 11th World Conference of the International Society of Family Law, Oslo 2004, pp. 417–426.

[35] See further Maarit Jänterä-Jareborg, Barn- och tvångsäktenskap I Sverige – finns det utrymme för olika kulturer och tolerans? Festskrift til Helge Johan Thue 70 år, 2007, pp. 304–320.

This practice was found to discriminate against children, on the basis of nationality, and it was heavily criticized.

The critics included the UN Committee on the Rights of the Child and the UN Committee on Human Rights. Foreign citizens had been clearly overrepresented among married persons under the age of eighteen years in Sweden. When the practice became public knowledge – and condemned in the media – the number of child marriages in Sweden went down dramatically and included very few children as young as fifteen years of age.[36] It is, however, difficult to estimate to what extent children are subjected to "religious" or other unofficial marriages within their own community, celebrated without permission under Swedish law.

Through the law reform, the general marriage age of eighteen years according to the Swedish Marriage Code became applicable to everybody wishing to marry in Sweden. A special permit by the county administrative board to marry at a lower age is necessary. Such a permit may be granted according to the redrafted, more stringent wording of the Marriage Code only if there is "special reason", with regard to the minor's own attitude and maturity. Interestingly, the Government Bill emphasizes that the fact that the minor is pregnant or belongs to a group supporting a lower marriage age due to traditions or religion is in itself not a sufficient reason for granting the permit.[37] Nevertheless, pregnancy can qualify as a special reason if it would place the minor as unmarried in a particularly vulnerable situation in her culture of origin.

4.2 Marriages celebrated abroad – when people wish to evade Swedish law

Marriages that take place abroad are, basically, outside Swedish control, and their recognition is subject to Swedish rules on private international law. Here the point of departure is that a marriage is legally valid in Sweden, if it is valid in the state of celebration or in a state or states where the man or the woman[38] were citizens or habitually resident at the time of the marriage.

[36] See Memorandum of the Swedish Ministry of Justice, Ds 2002:54, Svenska och utländska äktenskap, pp. 50–51, and SOU 1987:18, p. 352.

[37] See Government Bill (Prop.) 2003/04:48, pp. 20–22 and 45–46.

[38] Since 1 May 2009, Swedish legislation on marriage is gender-neutral and same-sex marriages are permitted. Not only is Sweden's Marriage Code reformed to this effect, but

Tightening the marriage requirements in Sweden was feared to lead to an evasion of Swedish law, in particular the age limit of eighteen years, by celebrating the marriage abroad. To avoid this, a new provision was introduced according to which a marriage that has been entered into under foreign law shall not be recognized in Sweden *if,* at the time of the marriage, there would have been an impediment to the marriage according to Swedish law *and* at least one of the parties was then a Swedish citizen or habitually resident in Sweden. It shall, for example, not be possible for parents to marry off their minor children in a foreign country, often the family's country of origin, and count upon the marriage's validity in Sweden. The marriage continues, as a rule, to be invalid in Sweden even after the child has reached the age of majority.

Non-recognition of the foreign marriage means that the marriage is null and void, i.e., that it does not legally exist and has no legal effects in Sweden. The marriage "limps" (limping marriage), if it is legally valid in the country of celebration. To prevent far-reaching negative consequences in individual cases the legislator decided to modify this point of departure by an additional provision stating that it would not apply "if there is special reason to recognize the marriage".[39] Examples given in the Government Bill[40] include (originally) bigamous marriages once the first marriage has been dissolved as well as situations where the link to Sweden at the time of the marriage was only of a formal character[41] but real and concrete in relation to the state where the marriage was celebrated, situations where a long time has passed since the marriage, and situations where regard to the joint children of the couple strongly calls for recognition in Sweden.

During the five years that have passed since the enactment, a strict practice of non-recognition has developed. The following case is illustrative.

all provisions in Swedish law relating to marriage are to be interpreted in a gender-neutral manner.

[39] Act 1904:25 p. 1, Ch. 1 § 8a para. 2.

[40] Government Bill (Prop.) 2003/04:48, pp. 32–33 and 55–56.

[41] This can be the case if one of the spouses was a dual citizen, possessing Swedish citizenship in addition to the citizenship of the State of habitual residence, but without factual "everyday" ties to Sweden.

Example: A marriage had been entered into in Lebanon between a 30-year old Swedish citizen, of Lebanese origin but since long domiciled in Sweden, and a 17-year old Lebanese citizen, domiciled in Lebanon. The Swedish Population Records Agency (= *Skatteverket*) refused to register the marriage, on the ground that the woman had been under 18 years of age at the time of the marriage. The court of first instance to which the couple appealed against this refusal, found reason to recognize the marriage considering that it had taken place only 10 weeks before the woman reached the age of 18 years and that she had married voluntarily.[42] The second instance court, nevertheless, confirmed the agency's decision.[43] The court explicitly stated that the fact that the woman had reached majority was not such a special reason that can justify recognition of the (in the eyes of Swedish law: invalid) marriage. This decision became legally effective and has formed an important precedent.[44]

When evaluating this strict practice it should be kept in mind that the couple is legally free to marry in Sweden once the minor has reached the age of majority.

Future actions are under consideration. The Swedish Government is expected to present a Bill to Parliament in the near future proposing that a custodian, who allows a child under the age of 16 to enter into a marriage that is valid in the country of celebration, shall be sentenced to imprisonment for a maximum of two years.[45] A requirement is that the child at the time of the marriage is a Swedish citizen or resident in Sweden.

[42] Länsrätten, Uppsala, case no. 2206-04E, decision 2004-10-21.

[43] Kammarrätten, Stockholm, case no. 7023-04, decision 2005-01-26.

[44] In a subsequent case, a female Swedish citizen had married in Ethiopia at the age of 17 years and 11 months. Even this marriage was refused recognition. In support of her application the claimant had, i.a., referred to the disgrace that the invalidity of the marriage would bring on her and her family, cohabitation without marriage being forbidden under Islam. Kammarrätten, Jönköping, case no. 3459-04, decision 2005-06-09.

[45] This provision is proposed to be included in Chapter 7 of the Penal Code "Offences Against Family". See SOU 2008:41 Människohandel och barnäktenskap – ett förstärkt straffrättsligt skydd.

4.3 Forced marriages abroad

According to the 2004 amendment, if it is made probable that a marriage was entered into under coercion, it shall not be recognized in Sweden.[46] To stress Swedish society's dissociation from marriages entered into under duress this ground of invalidity, unlike marriages contrary to Swedish marriage impediments, is *not* dependent on any link to Sweden at the time of celebration. It is as such also irrelevant when and where the marriage was celebrated and which of the spouses – the forced one or the other spouse – raises an objection on this ground towards the validity of the marriage.

> **Example:** The husband arrived in Sweden as an asylum seeker in 2002 and was registered in the Swedish population records as married. His wife arrived in Sweden a few years later, when the amendment was already in force. The competent Swedish authority deleted the husband's marital status from the population records, after the wife had made it probable that the marriage had been entered into under coercion. By that time, the wife had met a new man in Sweden whom she wished to marry.[47]

Arranged marriages between adults, on the other hand, are not banned in Sweden as long as coercion does not exist. Where such marriages are commonly practiced in the family's country and culture of origin, in Sweden's case mainly the countries around the Mediterranean and Middle East, this practice has, so to say, also followed with the emigrants into Sweden. This acceptance implies an insight indicating that the majority society (its institutions and legal order) should be open towards other cultures, as long as they respect human dignity, in this case the concerned individuals' autonomy to the final decision. Arranged marriages were, previously, also practiced in Sweden. Sweden's acceptance of arranged marriages is regularly attacked in the Swedish media, the problem being how to prove where the "arrangement" also entails coercive elements. No figures, or estimates, are available on the matter.

[46] See Act 1904:25 p. 1, Ch. 1 § 8a para. 1.2.

[47] Oral information from Swedish Population Records Agency.

5 Combating multiculture – the case of divorce

5.1 Divorce as a fundamental right of Swedish law

Since a law reform carried out in 1973, all divorce applications in Sweden are subject to the divorce provisions of the Swedish Marriage Code.[48] The law does not require any minimum duration of the marriage; theoretically this means that a marriage can be dissolved almost immediately after its celebration. In certain cases a reconsideration period of six months, counted from the application, is obligatory before divorce can be granted.[49] Whatever links the spouses may have to a foreign jurisdiction, through nationality or domicile, is today basically irrelevant.[50] Through this reform, a spouse's eventual "guilt" as regards the breakdown of the marriage, as well as any other irretrievable breakdown of the marriage, were abolished as grounds for divorce. A spouse's wish to dissolve the marriage is sufficient to obtain a divorce.

This approach qualifies divorce in Sweden as an issue concerning the fundamental freedoms of the individual, as well as equal rights of men and women. Just as a spouse is free to marry, he or she should be free to dissolve the marriage, irrespective of the wishes of others.

5.2 Collisions with other outlooks on divorce

This outlook collides with a more conservative outlook on family stability prevailing, for example, on the European continent, and explains Sweden's opposition to the European Union's plans to enact community rules concerning the law applicable to divorce in cross-border cases.[51] Obviously, it is also impossible to reconcile it with any patriarchic tradition

[48] See above, Section 3.2.

[49] A condition is that neither of the spouses objects to the divorce and that neither of them is the custodial parent of a child under the age of sixteen years. If these conditions are not fulfilled, an obligatory reconsideration period of six months must follow the divorce application. After that period, the divorce shall always be granted upon application of either spouse.

[50] Before the 1973 law reform, also foreign law could be applicable under certain circumstances.

[51] See Maarit Jänterä-Jareborg, Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe, Japanese and European Private International Law in Comparative Perspective, 2008, pp. 331–332 and 339–340.

which regards divorce as the *husband's* (more or less) sole right. Swedish case law includes several appealed cases where an immigrant wife originating from a Muslim country has applied for divorce in a Swedish court. In this case law, several issues have been at stake.

One of the issues has been whether the applicant's ties to Sweden are of such a nature as to grant Swedish jurisdiction. (In these cases the husband did not reside in Sweden.) Although an asylum seeker normally does not qualify as a resident of Sweden, this approach has not been followed in divorce cases. The Swedish Supreme Court has instead been willing to qualify the applicant as a resident, in particular in situations where her prospects of initiating divorce proceedings in another country were considered to be poor.[52]

It has also occurred that the defendant husband has objected to the application claiming that under the spouses' law of citizenship – e.g. Iran – only the husband has a right to dissolve the marriage, unless the marriage contract between the spouses stipulates otherwise. This objection has been disregarded by Swedish courts, also in a case where the respondent husband was resident in the spouses' country of origin and the wife alone had come to Sweden.[53]

As regards recognition of unilateral "*talak divorces*" by the husband, abroad, the Swedish Supreme Court has declared that they can be recognized in Sweden on the condition that at least one of the spouses had a close link to the state where the divorce took place *and* that a public authority of that state has been involved to some extent, for example that the *talak decree* has been registered by such an authority.[54] Probably, this position needs to be reconsidered with regard to the decision of the European Court on Human Rights in the case of Pellegrini v. Italy (2001)[55]. In its judgment the European Court considered Italy's recognition of a Vatican court annulment of the marriage between an Italian couple, upon application by the husband, to have violated the wife's right to a fair hearing, protected by the European Convention on Human Rights

[52] See Supreme Court Decision NJA 1994 p. 302, where the spouses originated from Bangladesh. The other decision along this line – NJA 1995 p. 238 – concerned a Croatian wife's divorce application against her Serbian husband.

[53] See Supreme Court Decision NJA 1991 A 2.

[54] See Supreme Court Decisions NJA 1989 p. 95 and NJA 1989 C 83.

[55] Judgment in the case of Pellegrini v. Italy (no 30882/96), European Court of Human Rights 20.7.2001.

(Article 6).[56] Mrs. Pellegrini, namely, in the Canon Law proceedings of the Vatican had not been given due opportunity to defend her case. After this judgment any unilateral divorce by the husband, not endorsed by the wife, should be considered to be a violation of the Convention and, as a result, not recognizable in Sweden. The recognition and enforcement of a foreign decree on divorce are seen as an integral part of the whole legal process leading to the divorce, and not just a separate part.[57]

It happens that the Swedish courts' jurisdiction and judgments are not recognized in immigrant communities. This seems to occur in particular in situations where divorce has been granted by the application of a wife, belonging to a Muslim community or originating from a Muslim country.[58] It is, instead, necessary that the Swedish divorce decree is supplemented by a religious divorce order, issued by a competent imam in Sweden which, in turn, seems to require the husband's consent and cooperation.[59] Where he is opposed, the wife's prospects of, e.g., visiting her country of origin and then return to Sweden may be insecure since the (still!) husband could refuse to permit her to leave that country.[60] Her eventual new marriage would not be recognized in her religious or ethnic community within Sweden, or in her country of origin.

Problems like this require a dialogue between the Swedish state and the communities involved.[61] One should not either forget that many Muslim practices are flexible. If a Muslim marriage contract stipulates that the wife may apply for divorce – unconditionally or upon specified grounds – this is accepted as lawful by Muslim jurists and respected.[62]

[56] Contrary to Italy, the Vatican is not a party to the European Convention on Human Rights.

[57] See also Michael Bogdan, Erkännande och verkställighet av med den europeiska människorättskonventionen oförenlig dom, Svensk Juristtidning 2003, p. 29.

[58] Note that although the overwhelming majority of the population of Turkey are Muslims, in legal contexts Turkey does not qualify as a "Muslim state". Turkish legislation originates from various other countries, for example, in family law from Switzerland. The examples in this contribution do not relate to "Turks".

[59] If a Muslim marriage contract stipulates that the wife may apply for divorce – grounds for this are often specified in detail – this would, however, be respected by the religious community.

[60] See further, Mosa Sayed, The Muslim Dower (Mahr) in Europe – With Special Reference to Sweden, European Challenges in Contemporary Family Law, 2008, p. 198–199.

[61] It is situations like this that the previously mentioned contributions concerning the accommodation of Muslims in England aimed at, see above Section 2.3.

[62] See Rubya Mehdi, Facing the enigma: talaq-e-tafweez a need of Muslim women in

In other cases, the Muslim dower (*mahr*) from the husband to the wife can be used as the wife's bargaining tool.[63] By being willing to consider to give up her right to the yet-to-be-paid *mahr*, or to return the *mahr* to the husband, the wife's position in divorce negotiations may improve considerably. At least to a certain extent, it should therefore be possible to avoid potential conflicts in advance and find a balance between what religion is claimed to require[64] and women's equal rights. More information and education of Muslim law instruments are needed also in Swedish society.

6 Understanding multiculture – the case of parental responsibilities, in particular child custody

In the Swedish experience, three issues are of a special complexity as regards parental responsibilities in a multicultural and transnational context:

* Who is the holder of parental responsibilities?;
* The increased risk for child abduction; and
* Determining the child's religion.

In this part, my contribution is limited to a brief, tentative identification of some of the most acute problems.

6.1 Who holds parental responsibilities?

The mainstream solution in the West regards both parents as holders of parental responsibilities, with equal rights and duties, irrespective of whether they are or have been married to each other and whether they live together. Divorce or separation is in itself irrelevant for the determination of parental custody. In Swedish law, for example, sole parental

Nordic Perspective, Integration & Retsudvikling, 2007, pp. 131–149.

[63] See Mosa Sayed, The Muslim Dower (Mahr) in Europe – With Special Reference to Sweden, European Challenges in Contemporary Family Law, 2008, pp. 197–199.

[64] Sayed emphasizes the religious dimensions of mahr and regards it as a religious practice, ibid, pp. 193–194.

custody is today exceptional when both parents are alive. This point of departure is not valid in all legal cultures, for example, in many of the so-called Muslim states.[65] The mother's rights of custody may be time-limited, depending of the child's age and sex, and they are subordinated to the father's rights of guardianship.[66] What happens when a family emigrates to Sweden from such a country? Does the father retain his privileged position or does the mother, once the family becomes resident in Sweden or acquires Swedish citizenship, come into an equal position with the father? Surprisingly, this issue is not settled by legislation or case law in Sweden.[67] This is a typical example of a situation where the new society lacks knowledge and insight of differences of approach.

A special solution for a situation like this is provided by the 1996 Hague Child Protection Convention.[68] According to the Convention, in situations where the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the state of the new habitual residence. Once Sweden has ratified the Convention, the Swedish outlook of equal parental responsibilities on both parents, *ex lege*, will apply to all families habitually resident in Sweden. The Convention's ratification is under preparation in Sweden, and the European Union expects all its member states to accede to this Convention.[69]

6.2 Increased risk for child abduction

The point of departure being today that both parents are holders of full parental responsibilities, the primary custodial parents, normally the mother, have become the primary abductors of children (approximate-

[65] By this concept is meant a state where the legal system in, e.g., family law bears a strong influence of Islam. I admit that this terminology remains vague but I believe that it can still bring forth the message, adequately enough. Turkey, for example, does not qualify as a Muslim state because the country's legislation is based on western models.

[66] See, e.g., David Pearl & Werner Menski, Muslim Family Law, Third Edition, 1998, pp. 410–412.

[67] See Lennart Pålsson, Svensk rättspraxis i internationell familje- och arvsrätt, Andra upplagan 2006, pp. 136–140.

[68] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children. See, in particular Article 16.4 of the Convention.

[69] See Council Decision 2008/431/EC authorizing members states to ratify or to accede to the 1996 Hague Convention. Official Journal, L 151, 11.6.2008, p. 36.

ly 70 % of all cases).[70] The 1980 Hague Convention on International Child Abduction[71] in many cases secures the safe return of an abducted child from one contracting state to the child's home state in another contracting state. Due not least to the differences of outlook regarding parental responsibilities, the Muslim countries, for example, are not parties to the Hague Convention.[72] As regards families originating from a Muslim country or "mixed families" where the father is of Muslim origin, the father dominates as abductor.[73] Culture and traditions, and even religious beliefs, can be expected to be the underlying reason, requiring the father to act accordingly. The return of the child from a state that is not party to the Hague Convention is complicated, if at all possible. It is particularly difficult in those cases where the state to which the child has been taken regards the abducting parent as the sole custodial parent or as the child's guardian. The agnatic family structure, where children belong to the father and his family, conflicts with an equalitarian outlook.

6.3 Determining the child's religion

Joint parental responsibilities mean in many jurisdictions, Sweden included, that both parents must jointly take *all* important decisions regarding the child, for example the child's religion. Ultimately in Sweden, if the custodians cannot agree, their joint custody must be dissolved in favor of one of the parents. The sole custodial parent alone may then decide on all issues and, for example, register the child of a Muslim father as a member of the Church of Sweden. A conflict arises, since according to Islam the child of a Muslim father is always a Muslim. Converting to another religion or abandoning the faith is not permitted. In states that qualify

[70] See, e.g., Nigel Lowe and Andrew Perry, International Child Abduction – the English Experience, International and Comparative Law Quarterly 1999, p. 132, and Maarit Jänterä-Jareborg, Olovliga bortföranden av barn: dags att ställa Sverige vid skampålen? Svensk Juristtidning 2000, pp. 876–877.

[71] Convention on Civil Aspects of International Child Abduction.

[72] Of the approximately 200 nation-states in the world, around 80 states are parties to the Convention. The states parties include Turkey. As has repeatedly been pointed out, Turkey does not qualify as a Muslim state in so far as legislation is concerned.

[73] See Maarit Jänterä-Jareborg, ibid. note 70, referring to US State Departments statistics from 1994, according to which in 68 % of the non-convention cases, the father was the abducting parent.

as Muslim (majority) societies,[74] religion's role is not limited to religious beliefs, but determines a person's status, rights and applicable rules. Bearing this in mind, it could be argued that membership, for example, of the Church of Sweden cannot be put on the same footing. I would go as far as to argue that, in such cases, it is in the child's best interests that such differences are given due regard when the parents choose the child's religion. "Wrong faith" in relation to the child's father and his family may deprive the child of any opportunity to a close relationship and rights within the paternal family. From a typical Swedish (secular) perspective, the child's formal religion is irrelevant, in these and other respects.

The child's right to freedom of thought, conscience and religion are complex issues. There is no such thing as a "Christian child" or a "Muslim child", but only a child of Christian or Muslim parents.[75] Even if a child has a belief of his or her own, it risks remaining provisional while the child is developing his or her own personality.[76] On the other hand, it is widely held that respect for a person's religious beliefs requires allowing that person to pass those beliefs on to his or her children.[77] According to John Eekelaar, the "real value in allowing parents to pass on their religious beliefs to their children is respect for the privileged sphere of the parent-child relationship".[78] When religion is central in the parent's own life, its impact on this relationship cannot be ignored. The challenge is to regard the child's best interests above the parents' mutually conflicting interests.

7 Concluding remarks

The survey above shows that Sweden's response to the challenges of multiculture, brought forth by the more recent immigration into the country, has been rather dismissive. Focus has been on the extreme sides of "foreign" traditions often, however, on the basis of limited knowledge of which practices and traditions are at stake. There has been very little – if any –

[74] Note, again, Turkey as an exception.

[75] See Richard Dawkins, The God Delusion, 2007, p. 18.

[76] John Eekelaar, Family Law and Personal Life, 2007, p. 97.

[77] It can also be claimed that in this situation two human rights collide, namely the child's right to choose his or her beliefs and the parents' right to bring up the child in accordance with their religion. Sweden's Minister of Integration, Nyamko Sabuni, shares this point of view. Dagens Nyheter, 19 November 2008.

[78] John Eekelaar, Family Law and Personal Life, 2007, p. 95.

public dialogue between the majority society and the new minorities. This has resulted in a growing suspicion – and mistrust – within the majority society towards the minorities. From the point of view of the minority groups, the lack of recognition may make it even more important to stick to the group's own traditions, perhaps more forcefully than what is the case at present in the culture of origin. Instead, both "camps" should publicly articulate what they consider relevant. For the minority groups this is particularly important in order to prevent mistrust and "misrecognition". Also, more knowledge and dialogue of a religion's true content and how it should be practiced is equally relevant, not least among the followers of each faith in question. At least some of the conflicts relating to women's subordinated role could be solved in this manner.

Generally speaking, it has taken time for the Swedish majority society to respond to any challenges of cultural diversity in the form of legislative measures. Where this has been the case, it has often taken the form of "combating multiculture and diversity", by subjecting everybody to Swedish law, as the cases of divorce and marriage exemplify. On the other hand, it may well be so that these examples are too special and that they, as a result, are not illustrative, because they concern situations where fundamental values are at stake, from the point of view of the Swedish society. A well-established point of departure in such cases is that everybody is to be subjected to "the law of the land" alone.

Considering the emphasis given in Swedish family law to the individual's human dignity and autonomy, any claims based on group identity cause uneasiness. How individual identity and group identity can be reconciled still remains to be solved in Swedish society. In the processes that can be foreseen, there is reason not to lose sight of Charles Taylor's recommendation, namely that a liberal society must remain neutral on the question of what is a good life, and restrict itself to ensuring that however they see things, citizens deal fairly with each other and that the state deals equally with all.[79] In cases of conflict between individual interests and group interests, the legal machinery should give priority to the former.

A further point that I wish to make is that private international law is not a sufficient tool for the recognition of cultural diversity. In our contemporary society, a request for the recognition of other ways of living

[79] Charles Taylor, et al., Multiculturalism. Examining the Politics of Recognition, 1994, p. 57.

does not end by the acquisition of a domicile (habitual residence) in Sweden or Swedish citizenship. It continues as long as the person – or the group in question – identifies itself with something else than "the law of the land" alone, for example with religiously-based traditions that differ from those of the Swedish majority society.

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Child Custody Determinations in a Multicultural Society:

The Use of Tribal Affiliation and Religion in Private Child Custody Disputes in the United States

"All of us form our own personal identities, based in part, on our religious, racial and cultural backgrounds. To say … that a court should never consider whether a parent is willing and able to expose to and educate their children on their heritage, is to say that society is not interested in whether children ever learn who they are."[1]

Rules of law relating to the family form the cornerstones of society and shape the daily lives of individuals. Child custody adjudications exemplify the significance and extensive influence of this legal field, as the determination of custody often serves as a determination of who will have primary control over the child's religion, education, moral upbringing, and cultural awareness. For several decades, the "best interests of the child" standard has governed child custody adjudications in the United States.[2]

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[1] Jones v. Jones, 542 N.W.2d 119, 123 (S.D. 1996).

[2] Almost all states use the best interests of the child standard when determining custody. Maria Pabón López, *A Tale of Two Systems: Analyzing the Treatment of Noncitizen Families in State Family Law Systems and Under the Immigration Law System*, 11 Harv. Latino L. Rev. 229, 234 (2008); *see also* Michael Grossberg, *How to Give the Present a Past?: Family Law in the United States 1950–2000*, *in* Cross-Currents: Anglo-American Family Law 1950–2000, at 8 (Stanford N. Katz et al. eds., 2001).

This flexible standard allows a family law court to consider any and all factors affecting the child on a case by case basis.[3] It also weaves a complicated web of ambiguity and vagueness for judges to untangle in private custody determinations.[4] The court must understand the relevancy of the various factors in order to safeguard a child's growth and development. This task becomes increasingly complex when the consideration includes cultural factors, which it inevitably must in a nation as diverse as the United States. So the question remains: How is a secular judge to make such determinations in a multicultural, multiracial, and multireligious country?

The United States has become an increasingly diverse nation since its inception.[5] The founding fathers were faced with the inherent tension between creating and maintaining strong national institutions while protecting individual rights by allowing religious, personal, and cultural autonomy.[6] Their successors confronted the challenge of balancing these dual goals in times when immigration substantially increased the diversity of the nation.[7] Early twentieth century reforms aimed at reversing discrimination drastically changed the composition of the immigrant population and, consequently, the composition of America itself.[8] The

[3] Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 Fordham L. Rev. 383, 384 (1989).

[4] *See* Barry Bricklin, *The Contribution of Psychological Test to Custody-Relevant Evaluations*, *in* The Scientific Basis of Child Custody Decisions 132(Robert M Galatzer-Levy & Louis Kraus eds., 1999) ("[T]here is no legally accepted definition of the 'best interests of the child standard,' and for practical and conceptual reasons, there may never be such a definition.").

[5] *See* Jill Norgen & Serena Nanda, American Cultural Pluralism and Law xiii (3d ed., 2006).

[6] *Id.*

[7] *See id.*, at xiv. At the beginning of the nineteenth century, most immigrants were from northern and western Europe and thus generally physically and culturally similar to the earliest settlers.*Id.* at xiv. Later immigrants from southern and eastern Europe and Asia comprised a far less homogenous group than their predecessors and were often hostilely viewed as a threat to American culture. *See id.* The latter half of the twentieth century saw a greater number of immigrants arriving from the Middle East, Asia, and Central and South America. *Id.* at 66.

[8] *See id.* at xv (identifying a "grudging[] acceptance" of non-white immigrants in order to fulfill the nation's need for workers).

country's minority population exceeded 100 million in 2007,[9] and the United States Census Bureau forecasts that minorities will compose over half of the nation's population by 2050.[10]

The increasing population, diversification, and political mobilization of minorities has altered the mainstream American view of culture. The United States followed the trend of other Western democracies, shifting from a mono-national ideal to a multicultural model without complete assimilation or exclusion of non-dominant groups.[11] The country is unique in that its fundamental tolerance manifests itself in individual constitutional rights rather than special status or explicit privileges given to minority groups.[12] Yet within the parameters of American cultural "pluralism,"[13] a concept emerged that required the acknowledgement of the rights and autonomy of cultural groups in order to acknowledge the rights and autonomy of the individual.[14] Accordingly, family law courts have incorporated multiculturalism into their decisions and specifically recognize the minority perspective and culturally relevant issues even when settling private disputes. In child custody jurisprudence, the best interest of the child standard recognizes the importance of and incorporates cultural factors into decisions involving children from ethnologically diverse and autonomous groups.

[9] Robert Bernstein, *U.S. Hispanic Population Surpasses 45 Million, Now 15 Percent of Total*, U.S. Census Bureau News,1 May, 2008, *available at* http://www.census.gov/Press-Release/www/releases/archives/population/011910.html.

[10] *An Older and More Diverse Nation by Midcentury*, U.S. Census Bureau News, Aug.14, 2008, *available at* http://www.census.gov/PressRelease/www/releases/archives/population/012496.html. Furthermore, sixty-two percent of the nation's population of children is expected to be comprised of minority group members in 2050, up from forty-four percent in 2008. *Id.*

[11] Will Kymlicka, *The Global Diffusion of Multiculturalism: Trends, Cause, Consequences*, *in* Accommodating Cultural Diversity 17, 17–18 (Stephen Tierney ed., 2007).

[12] *See generally* U.S. Const. amends. I–X; *see also* Norgen & Nanda, *supra* note 5, at xv (describing how the Bill of Rights demonstrates the entwinement of freedom and tolerance with its strong protections for minority groups).

[13] *See* Bruce T. Murray, Religious Liberty in America: The First Amendment in Historical and Contemporary Perspective 9 (2008) ("Pluralism is a philosophical commitment to diversity, a belief that there is some intrinsic good in difference.").

[14] *See* Helder De Schutter, *Towards a Hybrid Theory of Multinational Justice, in* Accommodating Cultural diversity, *supra* note 10, at 35, 45, 53–54. (opposing this liberal nationalist view and instead favoring the promotion of cultural groups in order to support the individual).

This Article explores the use of tribal affiliation and religion as factors in the best interest of the child determination in private child custody cases. Part I provides an overview of best interests of the child standard. Part II discusses the impact of tribal affiliation on custody determinations. Congress passed the Indian Child Welfare Act of 1978 (ICWA) to stop the widespread, state-mandated separation of indigenous children from their families and culture, but the Act is now applied to private disputes. ICWA's underlying presumption assumes that it is the best interest of an Indian child to be placed in an Indian home. Part III addresses the issue of religion and child custody. Parents have constitutional protections to raise their children as they see fit and to practice their religion without state interference, so courts must exercise caution when using religion as a factor in the best interest of the child standard in private custody cases. The Article concludes by emphasizing a need for cultural competency in private child custody determinations.

I Best Interest of the Child Standard

The guiding doctrine of family law in the United States is that the child's well-being is the paramount concern to any decision.[15] In accordance with this principle, private child custody determinations have evolved from rules-based adjudication to judgments founded on a discretionary standard.[16] Historically, the country followed an absolute paternal preference.[17]

[15] *See, e.g.*, Lehr v. Roberston, 463 U.S. 248, 257 (1983) ("[T]he Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed."); Am. Psychological Assoc., Guidelines for Child Custody Evaluations in Divorce Proceedings, Guideline I.2 (1994) ("In a child custody evaluation, the child's interests and well being are paramount. Parents competing for custody as well as others, may have legitimate concerns, but the child's best interests must prevail."); Joseph Goldstein et al., The Best Interests of the Child: The Least Detrimental Alternative 81–82 (1996) (favoring the child-centered guidelines even if some argue they "neglect the needs and rights of the adults").

[16] Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. Ill. U. L. Rev. 449, 451 (2005).

[17] *Id.* at 452 (describing the standard as a rule derived from the ancient roman *paterfamilias* canon and explaining how historic British law mandated that courts awarded fathers custody of children in all disputes).

After a transitional period, maternal preference rules gradually emerged in the latter half of the nineteenth and into the beginning of the twentieth century.[18] Courts interpreted statues that eliminated the paternal preference to favor custody awards to mothers when children were young, and this rule became known as the "tender years doctrine."[19] The great social changes in the country during the 1960s and 1970s precipitated the general-neutral best interests of the child standard, the preferred doctrine of modern American family jurisprudence.[20] The best interest standard focuses on the psychological well-being of the child and seeks to provide the best possible environment for his or her emotional growth.[21]

As family law is a matter left to the control of the states rather than the federal government, each state articulates its best interests of the child standard differently. Thus, the standard varies widely depending on the state of adjudication.[22] Some states explicitly list the criteria a judge should consider in the best interest of the child determination, and culture is often a required factor for courts to consider in these jurisdictions.[23] The best interests of the child standard varies further depend-

[18] *See id.* at 454 (attributing the change to a recognition that women were better caretakers as well as women obtaining greater social and economic power).

[19] *See id.*; Beschle, *supra* note 3, at 386. The rules favoring mothers foreshadowed the best interest standard as it shifted the court's focus to the needs of the children. Peskind, *supra* note 16, at 454 ("[B]y the end of the eighteenth century, the focus on children as economic tools of their father evolved into a consideration of the needs of the children and the parent better able to provide for those needs. This paradigm shift implicitly recognized the importance of children's interests distinct from the needs of parents.")

[20] Peskind, *supra* note 16, at 455–56. The change may also be partially attributed to constitutional challenges to the gender-biased preference. *See, e.g.*, People *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 182–83 (N.Y. Fam. Ct. 1973) (finding that the tender years doctrine violated the Equal Protection Clause of the Fourteenth Amendment).

[21] Louis Kraus, *Understanding the Relationship Between Children and Caregivers*, *in* The Scientific Basis of Child Custody Decisions, *supra* note 3, at 58. *But see* Glenn H. Miller, *The Psychological Best Interest of the Child Is Not the Legal Best Interest*, 30 J. Am. Acad. Psychiatry Law 196, 196–97 (2002) (opposing the psychological matters as the sole determining factor).

[22] Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 Yale L. & Pol'y Rev. 267, 269–80 (1987) (citing a lack of consistency among the factors used by different states and noting that, even when states provide statuary guidance in establishing criteria to consider in the best interests of the child determination, they do not assign weight to individual factors).

[23] The Minnesota statute, for example, defines "best interests of the child" as "all relevant

ing on the presiding judge interpreting the factors outlined in state law.[24] The factors serve as mere guidelines without a specific formula for making decisions.[25] Trial court judges are thus left with substantial discretion to decide such matters.[26] As one judge stated, "A child custody determi-

factors" and lists thirteen factors specifically to be considered and evaluated by the court:

(1) the wishes of the child's parent or parents as to custody;
(2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
(3) the child's primary caretaker;
(4) the intimacy of the relationship between each parent and child;
(5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
(6) the child's adjustment to home, school, and community;
(7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
(8) the permanence, as a family unit, of the existing or proposed custodial home;
(9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363A.03 of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child;
(10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
(11) the child's cultural background;
(12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and
(13) except in case in which a finding of domestic abused as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.

Minn. Stat. § 518.17 subd. 1(a) (2007).

[24] Some commentators contend that the best interests standard results in more out-of-court negotiations between parties than actual adjudications. *See* Eleanor E. Maccoby & Robert H. Mnookin, Dividing the Child: Social And Legal Dilemmas of Custody 282 (1992).

[25] *See, e.g.*, Minn. Stat. § 518.17 subd. 1(a) (2007). The Minnesota statute has been criticized for stating its factors too broadly and not weighing their importance. *See* Andrew Schepard, Children, Courts, & Custody: Interdisciplinary Models for Divorcing Families 164 (2004).

[26] Moreover, the trial court's decision will not be disturbed on appeal unless there is a

nation is much more difficult and subtle than an arithmetical computation of factors. It is one of the most demanding undertakings of a trial judge. …"[27] Consequently, the best interests of the child standard may be as challenging in its application as admiral in its goal.

Difficulty in adjudication is the best interests standard's main drawback.[28] The indeterminate standard forces reliance on the subjective preferences and biases of the fact finder.[29] The judge may have to choose between caregivers on the basis of any number of differences, from the mundane practice of bedtime routines to the fundamental question of the child's religious upbringing.[30] The American Law Institute criticized the best interests standard for exactly this reason, because, when faced with such questions, "the court must rely on its own value judgments, or upon experts that have their own theories of what is good for children and what is effective parenting."[31] So while flexibility is the standard's main advantage, it may also be its greatest liability.[32]

Naturally, there have been countless suggestions for more concrete standards to replace the best interests,[33] but it would be nearly impossible to reach a consensus as to the best child-rearing methods in a society as diverse as the United States.[34] As one scholar commented, "[T]he situa-

clear abuse of discretion. 24A Am. Jur. 2d *Divorce and Separation* § 929 (2008).

[27] Dempsey v. Dempsey, 292 N.W.2d 549, 554 (Mich. Ct. App. 1980).

[28] *See* American Law Inst., Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.02 cmt n.6 (2008) ("[T]he best interest of the child test … has long been criticized for its in indeterminacy.").

[29] *See* Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. Chi. L. Rev. 1, 6 (1987).

[30] American Law Inst., *supra* note 28, at § 2.02 cmt n.6.

[31] *Id.*

[32] *See* David L. Chambers, *Rethinking the Substantive Roles for Custody Disputes in Divorce*, 83 Mich. L. Rev. 478, 478, 480 (1984) (arguing that the best interest standard seems "wonderfully simple, egalitarian, and flexible" but is simultaneously too broad, in that it provides courts with insufficient guidance, and too narrow, in that some circumstances favor the recognition of factors other than the child's interests).

[33] *See generally* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & Contemp. Probs. 226 (1975) (providing the seminal criticism of the standard); *see also* Goldstein et al., *supra* note 15, at 193 (stressing the importance of stability in a child's upbringing and thus favoring a primary caregiver preference).

[34] *See* Maccoby & Mnookin, *supra* note 24, at 282 (describing alternatives to the best interests standard, such as the primary parent standard and a presumption of joint physical custody).

tions in which children live are so various, complex, and unpredictable that no adequately comprehensive, detailed and principled set of standards could be drawn up that would satisfactorily guide courts or agencies in making decisions about children."[35] Furthermore, the freedom of parents to raise their children as they choose promotespr cultural communities necessary for maintaining American pluralism.[36] While the best interests standard is criticized for being indeterminable and unpredictable, such open-endedness is necessary because each individual child and family situation is unique.

Two cultural factors, tribal affiliation and religion, highlight this dichotomy between individualization and uncertainty. Both factors are distinctive in the fact that federal law influences their application in best interests determinations. The Article first examines tribal affiliation, since it has a special place in child custody jurisprudence in the United States. Federal law specifically considers the role of culture in ICWA.

II The Role of Tribal Affiliation in Child Custody Determinations

Some state statues require courts to consider the child's culture as one of many factors in the best interests test of a private custody determination, but the federal government made such consideration binding in the case of Indian children. In 1978 Congress codified the concept that recognized Indian tribes as distinct, internally sovereign entities that had the right to either control or participate in decisions concerning the custody and adoption of Indian children.[37] ICWA signified a marked shift from the country's prior policy of assimilation,[38] in which abusive state legal

[35] Carl E. Schneider, *On the Duties and Rights of Parents*, 81 Va. L. Rev. 2477, 2485 (1995).

[36] *See id.* at 2486.

[37] *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901–1963 (2006)).

[38] Historically, American policy and law sought to force assimilation of Native Americans within the greater society. *See generally* Richard B. Collins, *A Brief History of the U.S.-American Indian Nations Relationship* 33, *in* Human Rights 3 (2006). Although a small percentage of the general population, it is unlikely that any other ethnic group's existence has been more affected by the law and policy than the Native Americans. Stella U. Ogunwole, U.S. Census Bureau, We are the People: American Indians and

practices lead to the "wholesale removal of Indian children from their homes."[39] Prior to the enactment of ICWA, the state had removed about one-third of all Native American children from their families and placed them in adoptive families, foster care, or institutions.[40] The crisis in Indian child welfare appeared to stem from the failure of state agencies to consider cultural and social differences between Native American and non-native communities in the placement process.[41]

One of the dual purposes of ICWA purports to address this issue. As stated in the Act's preamble, ICWA was intended to promote the "stability and security of Indian tribes and families."[42] It declares that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[43] In addition to recognizing the tribe's communal interests in preserving its cultural integrity, ICWA was also intended to promote the "best interest of Indian children."[44] The Act is premised upon the belief that it is in the best interest of an Indian child to retain the unique values of tribal culture. Thus, ICWA simultaneously serves to preserve the tribe and protect the best interest of the child.[45] In order to meet these goals, the courts must avoid the long-standing prejudice against Indian childrearing customs. Consideration of tribal affiliation is a first step in meeting this objective.

This Section describes how the holistic culture of Indian life is a vital component of the tribal affiliation inherent in ICWA's premises. It further details the statutory criteria required for ICWA's use in child custody adjudications. The Section then traces the evolution of ICWA's applica-

Alaska Natives in the United States 2 (Feb. 2006), *available at* http://www.census.gov/population/www/socdemo/race/censr-28.pdf (last visited 1 Sept., 2008) (stating that Native Americans are currently the smallest ethnic group in the United States, representing just 1.53 percent of the nation's total population); *see generally,* N. Bruce Duthu, American Indians and the Law, xxi (2008).

[39] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989).

[40] *Id.*

[41] *Id.*, *citing* 124 Cong. Rec. 38, 102 (1978) (statements by Rep. Udall and Rep. Lagomarsino).

[42] 25 U.S.C. § 1902 (2000).

[43] *Id.* at §1901(3).

[44] *Id.* at §1902.

[45] The Act protects "the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." *Id.*

tion from cases involving the state to its expanded use in private custody determinations. The Section highlights the increased state compliance with and overall importance of the federal act in recent years.

2.1 Holistic Culture of Native Americans Component of Tribal Affiliation

Tribal affiliation is a component of "ethnicity," which "includes aspects such as race, origin or ancestry, identity, language and religion."[46] Much debate has centered on the use of race in custody decisions. The law bans its consideration in such determinations, as the Supreme Court concluded that the harm in considering race in a custody case was greater than the potential good.[47] However, sensitivity to the need for children to be exposed to their ethnic heritage is distinguishable from racial considerations. Thus, a court may consider whether a parent is able to expose his or her children to their culture and educate them about their heritage.[48] ICWA is therefore constitutionally valid, as courts find it proper to consider a child's ethnic heritage as a factor in the best interest of the child standard.[49]

The state practices that lead to the widespread removal of Native American often stemmed from cultural ignorance about Native American families.[50] The premise of Native American culture is that individual existence is dependent upon survival of the group.[51] Native American culture focuses more on the collective rights of the community than individual rights.[52] Many Native Americans perceive themselves as part of the larger cultural group and not as a completely autonomous individual.[53] In accord with this view, every child belongs to both its nuclear family

[46] Statistics Canada, Ethnicity, July 25, 2008, *available at* http://www.statcan.ca/english/concepts/definitions/e-race.htm.

[47] *See* Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984).

[48] Jones v. Jones, 542 N.W.2d 119, 123–24 (S.D. 1996).

[49] *See, e.g.*, *id.* at 123.

[50] *See* Tanri Nagarsheth, *Crossing the Line of Color: Revisiting the Best Interests Standard in Transracial Adoptions*, 8 Scholar 45, 52 (2005) (["T]he removal of Native American children stemmed from the nation's failure to comprehend Native American child-rearing practices.").

[51] *See* Duthu, *supra* note 37, at 137.

[52] *See generally*, *id.* at 137–140.

[53] *See generally id.*

and the tribe.[54] Removing a child from his tribe deprives that child of his or her heritage and the community of a valued member.[55]

A component of this holistic culture is the tradition of children being raised in the context of the tribe rather than only within their immediate family.[56] Tribal members with childrearing responsibilities direct their efforts not only toward their biological children but towards all tribal children.[57] Moreover, grandparents, aunts and uncles, and cousins frequently raise children because of domestic obligations to the extended family.[58] This method of caretaking directly contrasts the Anglo-American custom, in which the parents are the primary and often only caregiver for their children.[59] This practice is so ensconced in American tradition that the United States Supreme Court has maintained that the right to raise one's children is considered "essential" and "the basic civil rights of man."[60] In light of the aforementioned differences between the childrearing values and practices of mainstream and Native cultures, special consideration is required in custody cases in which Native American families are involved in order to ascertain the best interest of their children and avoid discriminatory decisions. ICWA provisions seek to ensure such consideration.

2.2 ICWA's Early Applications

Congress passed ICWA in order to avoid individual and communal cultural deprivation. To accommodate the unique values of Native American culture, ICWA designates tribal courts as the preferred forum for adjudication of Native American child welfare cases.[61] The ICWA statute provides different jurisdictional rules for Indian children domiciled on and off the reservation. Specifically, the Act vests tribal courts exclusive jurisdiction over child custody proceedings involving an Indian child

[54] *Id.*
[55] *Id.*
[56] *Id.* at 151.
[57] *Id.*
[58] *Id.*
[59] *See* Richard Collin Mangrum, *Shall We Sing? Shall We Sing Religious Music in Public Schools?*, 38 Creighton L. Rev. 815, 853 (2005).
[60] *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citations omitted); *see generally* Jill E. Korbin, Child Abuse & Neglect: Cross-Cultural Perspectives 3 (University of California Press, 1981).
[61] 25 U.S.C. § 1911(a) (2006).

residing or domiciled on a reservation.[62] In cases in which an Indian child lives outside the reservation, ICWA requires transfer to a tribal court under certain circumstances, including upon the request of the tribe or the parents.[63] The Act provides that the state court maintains jurisdiction if the tribe declines jurisdiction after receiving appropriate notice, a parent objects to the transfer, or there is good cause not to transfer the proceeding to a tribal court.[64] ICWA also proscribes a heightened standard for termination of parental rights and placement preferences for Indian custodians when a state court presides over the custody proceeding.[65] For adoptive placements, the Act gives preference to "a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[66] State courts were slow to comply with ICWA during the first several decades following its enactment, but an increase in litigation resulted in an increase in application of the Act.

The United States Supreme Court has heard only one case dealing with ICWA. In *Mississippi Choctaw Band of Indians v. Holyfield*, a Native American mother residing on a reservation had given birth to twins outside of it, and both parents consented to adoption in a state court with the intent of placing the babies with a non-Native American family.[67] Counsel for the adoptive parents argued that the Choctaw mother wanted to place the children outside of the tribe and provide them with opportunities unavailable on the reservation.[68] The Court overruled the lower courts' rulings of ICWA as inapplicable to the proceedings and held that "[t]ribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe." [69] The Court held that although the statute itself did not include a definition of the term "domicile," the

[62] *Id.*
[63] *Id.* § 1911(b).
[64] *Id.*
[65] *Id.* § 1915.
[66] *Id.* §1915(a). There are similar placements for foster care or preadoptive placement expressed in 25 U.S.C. § 1925(b).
[67] Mississippi Choctaw Band of Indians v. Holyfield, 490 U.S. 30, 39 (1989).
[68] *See* Brief of Appellee, Mississippi Choctaw Band of Indians v. Holyfield, 490 U.S. 30 (1989) (No. 87-980).
[69] 490 U.S. at 59.

meaning of the term must be construed according to congressional intent to effectuate the purposes of the Act.[70] This case reinforced the emphasis the Act places on the tribe's role in child custody determinations.

2.3 Criteria for ICWA to Apply to Child Custody Determinations

As evidenced by the *Holyfield* decision, the judicial system strives to meet ICWA's dual goals. However, courts may not apply the Act unless three criteria have been met. First, the child must be an "Indian child."[71] Statutorily defined, "Indian child" means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[72] Second, it must be established that the Indian child is the subject of a "child custody proceeding."[73] The Act defines "child custody proceeding" to explicitly include foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.[74] Third, the proceeding must not involve awards arising out of a divorce proceeding or juvenile detention as a result of criminal activity.[75]

Establishing that the Indian child is the subject of a child custody proceeding often leads to controversy, especially when a party is trying to prove a foster care placement. Each of the four proceedings are described by the Act, which defines "foster care placement" as

> any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.[76]

This definition was a decisive issue in *Gerber v. Eastman*.[77] In this case, the Minnesota Court of Appeals found that a non-Indian father's attempt

[70] *Id.* at 47.
[71] 25 U.S.C. § 1903(4) (2006).
[72] *Id.*
[73] *Id.* § 1903(1)(i–iv).
[74] *Id.*
[75] *Id.* § 1903(1).
[76] *Id.* § 1903(1).
[77] Gerber v. Eastman, 673 N.W.2d 854 (Minn. Ct. App. 2004).

to obtain custody of his Indian child, who was in the custody of his maternal grandmother, was not a foster care placement as established by the Act.[78] The court considered the policy implications of its decisions. It concluded that denying custody to a biological parent would not serve ICWA's goals of preserving the tribe and family.[79] Thus, the appellate court ruled ICWA inapplicable on these grounds.[80] It is unclear if the court truly believed that the proceeding failed to fall under the statutory definition of a foster care placement or if it was simply placing the paramount right of the parent above the interest of the tribe.[81]

As evidenced by *Gerber v. Eastman*, courts do not automatically apply ICWA to child custody determinations involving Native American children. Careful statutory interpretation is necessary to determine whether a particular child custody dispute is governed by ICWA, and many courts have found that the Act does apply to private custody matters. While some cases may appear to contradict the *Gerber* decision, all states follow the criteria expressed by ICWA. The differences lie in the courts' resolution of the ambiguities stemming from the imprecise language of the statute, varying weight given to ICWA's policy considerations, and the fact-specific nature of child custody proceedings.

2.4 *Starr v. George*: Application of ICWA in a Private Child Custody Dispute

A private custody dispute involving ICWA may arise when both parents are unable to care for their children. A tragic example of this situation is the case of *Starr v. George*, in which both parents were unavailable to fulfill their caretaking responsibilities because the children's mother was imprisoned for murdering their father.[82] A custody dispute between the

[78] *Id.* at 857 (finding that the grandmother failed to establish that the placement at hand would be a foster care placement, because the child would be returned to the custody of her parent rather than placed in a foster home or the home of a guardian or conservator).

[79] *Id.* at 858.

[80] *Id.* at 857–58.

[81] In either interpretation of the decision, the case was subject to Minnesota's Uniform Child Custody Jurisdiction and Enforcement Act and not exclusive tribal court jurisdiction. *Id.*

[82] Starr v. George, 175 P.3d 50, 51–52 (Alaska 2008). Denni Starr had fatally stabbed Buddy George while he was holding their infant daughter and was consequently sen-

maternal and paternal grandparents ensued over the two Tlingit children, whom the court and involved parties undisputedly considered "Indian children" within the meaning of ICWA.[83]

The Alaska Superior Court found that ICWA did not apply to the case because the dispute did not raise either of the dual concerns of ICWA but rather justified application of the Act's divorce exception.[84] Thus, although the local tribal council of the parties had recognized the maternal grandparents' adoption of the children, the court found it was in the children's best interest to award custody to the paternal grandparents.[85] In overruling the appellate court's decision, the Alaska Supreme Court found ICWA to be applicable in the dispute.[86] While the court had previously extended the divorce exception to unmarried parents, it concluded that the exception did not apply to grandparents, even in situations where the parents were unavailable.[87] In light of precedent and policy concerns, the court found that ICWA did not contain an exception for disputes between extended family members, including grandparents.[88]

Although the Alaska Supreme Court ultimately affirmed the superior court's decision,[89] its decision evidenced the growing trend of applying ICWA to private custody disputes. Congress enacted ICWA to curb state-mandated removal and its original application was exclusively to matters in which the state was a party. In fact, the Act only explicitly applies to certain custody proceedings, and courts have interpreted ICWA to be inapplicable to custody disputes arising out of divorce proceedings.[90] This so-called divorce exception serves to guarantee that the interests of the tribe do not interfere with the fundamental rights of parents.[91] However, since the Act requires compliance in both voluntary and involuntary

tenced to thirty-one years in prison. See Starr v. State, 2007 WL 293072, *1–2 (Alaska App. 2007).

[83] Starr v. George, 175 P.3d at 54 n.16 (citing 25 U.S.C. § 1903(4) (2006)).

[84] *Id.* at 53.

[85] *Id.* at 54.

[86] *Id.* at 54–55.

[87] *Id.* at 54 (citing John v. Baker, 982 P.2d 738, 747 (Alaska 1999)).

[88] *Id.* (citing A.B.M. v. M.H., 651 P.2d 1170, 1173 (Alaska 1982)).

[89] Starr v. George, 175 P.3d at 59 (affirming because the tribal adoption proceedings did not accord the paternal grandparents due process and were thus not entitled to full faith and credit in the state courts).

[90] *See, e.g.*, DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510, 513 (8th Cir. 1989);); In re D.A.C., 933 P.2d 993, 1000 (Utah Ct. App. 1997).

[91] Starr v. George, 175 P.3d at 55.

proceedings, courts may apply ICWA in cases where caregivers do not have rights as paramount as those of parents. Custody disputes involving grandparents are a prime example of ICWA's applicability to private custody disputes.

2.5 Other Examples of ICWA's Application in Private Child Custody Disputes

Some jurisdictions have taken a similar approach to the Alaska Supreme Court in *Starr v. George* in the adjudication of private child custody matters involving Native children. Since ICWA is premised upon the belief that it is in the child's best interest to maintain a relationship with the tribe, many courts have found that the most effective way for states to incorporate the customs and traditions of Indian tribes in child custody determinations is to allow tribal intervention. They defer to tribal courts, even when the case exclusively involves family members, if the prongs of ICWA applicability are met. Such tribal inclusion helps determine the best interest of the child and avoid cultural bias against Native values and customs.

In *In re Custody of A.K.H.*, the Minnesota Court of Appeals held that intrafamily disputes between grandparents and parents were not excluded from the coverage of ICWA.[92] In a dispute between the mother and paternal grandmother, the *A.K.H.* court found that intervention by the tribe would serve to further the purposes of the Act.[93] While all parties seeking custody of the child were members of an Indian tribe, the court maintained tribal intervention was necessary to determine the best interest of the child.[94] It found that a person was not necessarily capable of raising a child "to respect the unique social and cultural environment of Indian life" simply because that person was a member of a tribe.[95] The court was concerned that state agencies would not be the best judge of custodial fitness, since they had previously failed to take the special circumstances and problems of Indian families into account in home studies.[96] Thus, the court concluded that "input from the Indian tribe [was] desirable"

[92] In re Custody of A.K.H., 502 N.W.2d 790, 796 (Minn. Ct. App. 1993).
[93] *Id.* at 795.
[94] *Id.*
[95] *Id.*
[96] *Id.* at 795–96.

for custody determinations involving Indian children even when the custody was guaranteed to be in an Indian home.[97] The court maintained that tribal sovereignty had to be respected in family law cases and tribal governments were best suited for evaluating cultural premises underlying Indian childrearing.[98] In doing so, the court acknowledged that the justice system had failed to recognize the uniqueness of Native American culture and emphasized that lack of this cultural understanding was just as devastating in disputes in intrafamily disputes as it was in cases where the state removed children from their homes.[99]

The South Dakota Supreme Court followed the majority rule typified by the *A.K.H.* court in *In re Guardianship of J.C.D.*[100] It held that ICWA applied to a child custody proceeding between parents and grandparents when good cause did not exist to deny the transfer to tribal court.[101] The court reasoned that if "the rights acquired by the grandparents qualified as an ICWA guardianship," such as a foster care arrangement, the placement was a proceeding contemplated by the Act.[102] The court concluded it was a matter for the tribe to determine the best interest of the child.[103] Using a similar analysis, the Washington Supreme Court held that ICWA applied to a dispute between parents and grandparents in *In re Mahoney*.[104] However, the majority applied the state's best interest of the child standard rather than use ICWA's standard.[105] The dissent disagreed with the majority's application of the best interest of the child standard and favored ordering a new trial with use of ICWA standards, which would have considered the children's welfare in "the context of relevant family structure and cultural background."[106] The dissent stressed that Indian culture is not well understood by the state and the court has an inherent bias in favor of Anglo-American values.[107]

[97] *Id.* at 795.
[98] *Id.* (citing Mississippi Choctaw Band of Indians v. Holyfield, 490 U.S. 30, 34 (1989)).
[99] *Id.*
[100] *See* In re Guardianship of J.C.D., 686 N.W.2d 647 (S.D. 2004).
[101] *Id.* at 649.
[102] *Id.* at 648.
[103] *Id.* at 650.
[104] In re Mahaney, 51 P.3d 776, 783 (Wash. 2002).
[105] *Id.* at 893, 784.
[106] *Id.* at 899, 787 (Chambers, J. dissenting).
[107] *Id.*

The applicability of ICWA to child custody determinations is as important today as it was at the time of its enactment.[108] The use of the Act in private disputes emphasizes its significance in modern child custody jurisprudence and has sought to protect the interests of Native American children, their families, and their tribes. While tribal affiliation is a more recent addition to the best interests standard, religion has its roots deep in the history of child custody determinations.[109] However, unlike tribal affiliation, use of religion is limited rather than mandated by the federal government.

III The Role of Religion in Child Custody Determinations

Religion is another factor many courts consider in private child custody determinations, but a trial judge is constitutionally limited in making such decisions. Religious liberty in the United States originates in the Free Exercise Clause and the Establishment Clause of the First Amendment to the Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[110] The Supreme Court's First Amendment philosophy has changed significantly over time and continues to evolve today. In the middle of the twentieth century, the Court adopted the metaphor that the First Amendment served as "a wall of separation between church and

[108] ICWA is also significant in a context extending beyond family law. *See* Duthu, *supra* note 37, at xxi (describing how contemporary legislation, including ICWA, has made great strides in recognizing the right of Native Americans to maintain their culture on the own terms and regain or preserve control over their own legal matters).

[109] Family law students are routinely exposed to the case of *Shelley v. Westbrook*. (1817) 137 Eng. Rep. 850 (Ch.). In a time when fathers' common-law rights over legitimate children were almost limitless, the poet Percy Bysshe Shelley was legally deprived of custody because he was an atheist. *See id.;* Megan Doolittle, *Fatherhood, Religious Belief and the Protection of Children in Nineteenth Century English Families*, *in* 33 Gender and Fatherhood in the Nineteenth Century (Trev Lynn Broughton & Helen Rogers, eds., 2007).

[110] U.S. Const., amend. 1. The Substantive Due Process Clause also provide parents with great control over choosing their own and their children's religion, thus further inhibiting interference from the justice system and particularly trial court judges in custody adjudications. *See* U.S. Const., amends. 5, 14.

state."[111] In the latter half of the century, the Court came to view the wall of separation as a mere "blurred, indistinct, and variable barrier."[112] While the Court's current position is difficult to define, it appears less supportive of an absolute separation of church and state and more open to permitting the government "some latitude in recognizing and accommodating the central role religion plays in [American] society."[113]

Furthermore, the modern Court is increasingly using words like "pluralism" and praising diversity and its historic importance to the nation in its decision involving the Establishment and Free Exercise Clauses.[114] As one scholar declared, "We have to think about the First Amendment in light of who we have become. … This requires moving from a model of unity at the expense of diversity, to a model that expresses unity in the interest of diversity."[115] Thus, interpreting the principles of religious liberty may not just be a challenge for the judiciary, but one for all Americans.[116]

This Section highlights the importance of religion in the United States. It then describes the court's unwillingness to infringe on the free exercise and establishment rights of parents and the resulting reluctance of judges to truly consider religion as a factor in the best interest of the child standard. Even where proscribed by statute, judges generally do not consider religion unless there is a showing of harm. Such practice has its basis in the nation's history and is exemplified by numerous cases in the private custody context.

[111] Everson v. Board of Education of Township of Ewing, 330 U.S. 1, 16 (1947) (citing the views of Thomas Jefferson).

[112] Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (citing Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

[113] County of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part) ("Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage."); Murray, *supra* note 12, at 153.

[114] Murray, *supra* note 12, at 153 (citing, for example, *County of Allegheny*, 492 at 627 (O'Connor, J. concurring in part and dissenting in part).

[115] *Id.* at 22 (quoting Charles C. Haynes, Church and State and the First Amendment, Lecture at the FACS/Pew Journalism, Religion & Public Life Seminar (Sept. 23, 2003).

[116] *Id.* at 170.

3.1 Religious Freedom and Diversity in the United States

Religious interplay with the law has deep roots in American history.[117] The founding fathers wanted to preserve and promote freedom of religion to shield the already religiously diverse country from religious conflicts Europe had experienced in the preceding centuries.[118] Today the United States embraces religion more than any other developed nation.[119] The majority of the population accepts diversity and the state strives to provide equal recognition and respect to all religions,[120] but religious practices outside the mainstream have historically invoked hostility and led to prohibition and prosecution by the state.[121] The conflict can become quite pronounced when it involves the welfare of a child.

Child welfare has been and continues to be a contentious issue in First Amendment jurisprudence. Families serve as an important means of sustaining religious culture, and American families are becoming increasingly diverse. There has been an increase in interfaith marriages and children claiming a different religious identity than their parents.[122] These demographic changes require that modern courts pay greater attention to the issue of religion and walk a fine line between protecting the constitutional rights of parents and the welfare of the child in both private cases

[117] *See* County of Allegheny v. ACLU, 492 U.S. 573, 589 (1989) ("This nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American continent.").

[118] A Delicate Balance: The Free Exercise Clause and the Supreme Court, The Pew Forum on Religion and Public Life (Oct. 2007) *available at* http://pewforum.org/assets/files/free-exercise-1.pdf.

[119] A 2002 Pew study reports that fifty-nine percent of Americans claim that "religion plays a very important role in their lives," as compared to thirty-three percent of the British, thirty percent of Canadians, and just eleven percent of the French. *See* Murray, *supra note* 12, at 4.

[120] *See* Carolyn Hamilton, Family, Law and Religion 1–2 (1995). The United States is a nation with diverse religious affiliations—over 3,000 groups—but has a strong majority of Christians, with over seventy-eight percent of the population belonging to the faith. *See* Murray, *supra note* 12, at 4, 10.

[121] Norgen & Nanda, *supra* note 5, at 139. Conflicts have most notably arisen between the government and members of fundamental religions and minority religious groups, including Mormons, Jehovah's Witnesses, and the Amish. *See, e.g.*, Religious Composition of the U.S., *supra* note 54 (showing that Mormons comprise 1.7 percent of the total population, Jehovah's Witnesses make up 0.7 percent and the Amish represent less than 0.6 percent of all Americans).

[122] *See* Michael Loatman, *Protecting the Best Interests of the Child and Free Exercise Rights of the Family*, 13 Va. J. Soc. Pol. & L. 89, 89–90 (2005).

and those matters in which the state is directly involved.[123] This potential clash of interests often pushes family law to the forefront of freedom of religion debates.

3.2 Threat of Harm Standard

In the context of family law, courts have consistently protected the interest of parents with respect to controlling religious upbringing of their own children.[124] The United States Supreme Court case *Wisconsin v. Yoder* is often cited for this issue.[125] The *Yoder* test provides that only a grave threat of harm may justify state intrusion on a parent's free expression or fundamental right to direct the education and upbringing of a child and "parental authority in matters of religious upbringing may be encroached upon only upon a showing of a 'substantial threat' of 'physical or mental harm to the child.'"[126]

Courts often apply a similar test to the one set forth in *Yoder* to matters outside the educational arena, including high-profile cases involving life threatening medical situations. The Supreme Court stated in another landmark case, *Prince v. Massachusetts*, that a parent's right to practice religion did not include "the liberty to expose … the child … to ill health or death."[127] Resultantly, courts have been willing to order medical treatment for children whose lives are in danger, even if it is against their parent's religious beliefs.[128]

It appears that courts use a similar standard considering the potential grave threat of harm in determining the best interest of the child in private disputes. While religion may still influence the court's opinion, judges carefully compose their decisions to downplay its role or avoid the subject altogether. Following this practice, most courts only deny custody on the basis of religion when the religious practices of the custodian are inimical to the welfare of the child.

[123] *See* Carolyn Hamilton, family, law and religion 337–38 (1995).

[124] *See* 124 A.L.R. 5th 203.

[125] 406 U.S. 205 (1972).

[126] *Id.* at 230 (treating the matter as an issue of parents' constitutional rights rather than addressing the best interest of the child).

[127] 321 U.S. 158, 166–67 (1944)

[128] *See, e.g.*, Jehovah's Witnesses v. King County Hospital, 278 F. Supp. 488, 505 (W.D. Wash. 1967) (upholding legislation authorizing courts to order blood transfusions necessary to save the lives of children against the religious objections of their parents).

3.3 Neutral Approach to Weighing Religion Unless Harm Found

The United States seems to recognize the necessity for tolerance and respect in a pluralistic society, but private disputes among families pushes courts to the limits of the religious impartiality. The Supreme Court has interpreted the First Amendment to mean that the government "must be neutral in matters of religious theory, doctrine, and practice."[129] The government may not be hostile to or advocate any religion, and "it may not aid, foster or promote one religion … against another."[130] Many courts have taken the position that religion may be only considered in the best interests of the child standard if viewed with a strict impartiality between religions.[131] In custody cases, the Free Exercise and Establishment Clauses have been interpreted to mean that a trial judge must maintain absolute neutrality with regard to favoring one religion over another or even a religious parent over a non-religious parent.

Traditionally, such judicial determinations favored the more religious parent, but today non-religious activities are also viewed as possible means of developing the moral and social responsibility of a child.[132] Furthermore, secular courts do not weigh the relative merits of religions or question an individual's beliefs.[133] Rather than passing judgment on a religion, the courts attempt to determine the impact of a religion on the

[129] *See* Epperson v. Arkansas, 393 U.S. 97, 103 (1968)

[130] See id.

[131] There are numerous cases supporting the view that a court in a child custody proceeding cannot pass judgment on the comparative merits of religions. *See, e.g.*, Osteraas v. Osteraas, 859 P.2d 948, 953 (Idaho 1993); In re Marriage of Decker, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003); Ficker v. Ficker, 62 S.W.3d 496, 499 (Mo. Ct. App. E.E. 2001); Gould v. Gould, 342 N.W.2d 426, 432 (Wis. 1984).

[132] Kent Greenawalt, *Child Custody, Religious Practices, and Conscience*, 76 U. Colo. L. Rev. 965, 968 (2005).

[133] *See* Quiner v. Quiner, 59 Cal. Rptr. 503 (Cal. App. 1967), *hearing granted and parties reached settlement rendering judgment moot,* 59 Cal. Rptr. 503 (Cal. App. 1967). The appellate court supported this approach by maintaining:

> If a court has the right to weigh the religious beliefs or lack of them of one parent against those of the other, for the purpose of making the precise conclusion as to which one is in the best interests of the child, we open a Pandora's box which can never be closed. By their very nature religious evaluations are subject to disbelief and difference of opinion. The First Amendment in conjunction with the Fourteenth solves the problem; it legally prohibits such religious evaluations.

Id. at 516.

welfare of the child and ascertain whether its practices would harm or endanger the child's health or well-being.

To decide for one custodian on the basis of religion alone would be a breach of the Free Exercise and Establishment Clauses, so courts must consider the practical consequences of membership of a particular religion.[134] A court may discriminate against a parent on the basis of religion in limited circumstances. While it cannot hold that one parent's religion is preferable, a court can find that it is not in the best interests of the child to follow the practices of a certain religion. The court must assess the effects of the parent's religious practices on the child rather than evaluate the religion itself.[135] If evidence substantiates that the religious practices endanger the child's welfare, the court may justifiably refuse to grant custody to the practicing parent.[136]

When looking at the totality of the circumstances, a court may find that one parent's religious practices may be harmful to the child or not in his or her best interests. If it such practices and tenets of belief are simply not in the child's best interests, courts tend to rule in favor of a parent's right to transmit religious values to the child. Courts very rarely find that it is against a child's best interest to be brought up within the practices of one parent's beliefs.

3.4 *Shepp v. Shepp*: A Private Child Custody Case Emphasizing a Parent's Constitutional Right of Free Exercise of Religion

A recent and prime example of the court's reluctance to curtail a parent's right to religious freedom in a private dispute is *Shepp v. Shepp*.[137] The 2006 case posed the question of whether a parent who preached beliefs contrary to the law should lose joint custody of his child.[138] In *Shepp v. Shepp*, both parents had converted to the Mormon faith before marriage, but the father was later excommunicated from the church because of his

[134] *See generally*, Neela Banerjee, *Religion Joins Custody Cases, to Judges' Unease*, N.Y. Times, Feb. 13, 2008, *available at* http://www.nytimes.com/2008/02/13/us/13custody.html?_r=1&scp=1&sq=religion%20custody&st=cse&oref=slogin.

[135] *See* Hamilton, *supra* note 119, at 185–86.

[136] *See id.*

[137] Shepp v. Shepp, 906 A.2d 1165 (Pa. 2006).

[138] *Id.*

fundamentalist beliefs, which included polygamy.[139] The father shared custody with the couple's one child after the divorce, and he taught her about plural marriages as part of his fundamental Mormon philosophy.[140] In a hearing to determine the father's request for primary custody, the trial court found that both parents appeared to have "adequate character, conduct, and fitness."[141] The one exception to this finding the court noted was the fact that the father acknowledged a belief in polygamy.[142] If acted upon, this belief would be illegal in the commonwealth and "immoral and illogical."[143] The court awarded primary custody to the mother and prohibited the father from teaching his nine year-old child about polygamy.[144] The Superior Court affirmed, as it found it to be in the child's best interest to restrict the father's plural marriage teachings until she was eighteen years old.[145]

The Supreme Court of Pennsylvania balanced the competing interests of free exercise of religion as guaranteed by the First Amendment of the United States Constitution and the best interest of the child standard, which included the public policy consideration of assuring children contact with and care from both parents after a divorce.[146] The court expounded that child custody decisions had to focus on the "character and conduct" of the individual parties involved.[147] It also held that it could prohibit a parent from advocating religious beliefs that constitute crimes, such as polygamy, but only where "it [was] established that advocating the prohibited conduct would jeopardize the physical or mental health or safety of the child."[148]

In this case, no harm was established and thus the court neither prohibited the father's speech nor revoked his shared physical custody of the child.[149] In reversing the lower court's decision, the Supreme Court of Pennsylvania avoided infringing the father's constitutionally protected

[139] *Id.* at 1166.
[140] *Id.* at 1167.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.* at 1168.
[145] *Id.*
[146] *Id.* at 1168–69.
[147] *Id.* at 1174.
[148] *Id.* (following the framework of *Wisconsin v. Yoder,* 406 U.S. 205 (1972)).
[149] *Id.*

rights. *Shepp v. Shepp* is representative of a growing line of cases that recognize the role of religion in child custody determinations but fail to make decisions based on this factor for fear of breaching the parent's right of free exercise of religion.

3.5 Other Examples of Religious Considerations in Private Child Custody Determinations

Even in the face of constitutionally-required religious neutrality, it is the paramount interest of the court to find what is in the best interest of the child and "[t]o hold that a court may not consider religious factors under any circumstances would blind courts to important elements bearing on the best interest of the child."[150] Yet case law demonstrates that courts almost always avoid touching the religion question unless the religious practices are inimical to the child's best interests. In instances where religion is not a grave threat of harm, the courts make custody determinations based on factors other than the parties' beliefs.

Where actual harm is found, courts rule against the parent's right to indoctrinate the child. In *In the Marriage of Hadeen*, the court held that religious practices could be considered in custody determinations to the extent that they would jeopardize the physical safety or mental health of the child.[151] The case centered on a parental dispute that arose where the mother was raising her children as members of the First Community Churches of America.[152] The trial court found that the separatist sect was harsh and deprived children of normal social contacts.[153] Reasoning that the child's mental health and opportunity for personal growth would be better developed with the non-sectist father, the trial court took custody of four of the five daughters away from the mother.[154] The appellate court reversed, finding that there was no evidence that the practices of the separatist sect had any effect on the well-being of the child.[155] The court concluded that there had to be a showing of "reasonable and substantial likelihood" of immediate or future impairment before it could consider

[150] Bonjour v. Bonjour, 592 P.2d 1233, 1238 (Alaska 1979).
[151] *See* In re the Marriage of Hadeen, 619 P.2d 374 (1980).
[152] *See id.* at 375.
[153] *Id.*
[154] *Id.* at 379.
[155] *Id.* at 382.

and weigh the practices of the religion in a private dispute.[156] The court did not consider the mother's use of corporal punishment, rejection for disobedience, and teachings of alienation of non-members, because it held that such practices were part of her religion and thus improper considerations for the court to review in the absence of temporal harm.[157] This exemplifies the impossibility the courts face: balancing the best interest of the child standard with free exercise of a religion that includes practices the majority vehemently opposes.

Some states do not require an explicit showing of immediate harm but rather purport to take all circumstances into account when considering religion as a factor in private child custody determinations. The analysis in these jurisdictions follows closely with the cases described above, but they often decide against awarding custody to the strictly religious parent in instances in which states requiring a showing of harm would be unlikely to come to such a conclusion. In *Burman v. Burman*, the court maintained that it had a duty to examine the impact of the parent's beliefs on the child even in the absence of evidentiary support of future impairment.[158] Again the case involved a mother raising her children in a fundamentalist sect in opposition to the father's wishes.[159] As part of the Tridentine Church, the mother believed the child was illegitimate since the parents were not married in the church and was willing to desert the child if she disobeyed the rules of the church.[160] The Nebraska court ruled it was not in the best interest of the child to remain with her mother and awarded custody to the father.[161] Without a showing of temporal harm, the court exposed itself to criticism that it was in breach of the mother's constitutional right to free exercise of religion.[162]

A similar standard was applied in *Ex parte Snider*, a case in which a staunchly conservative Christian mother petitioned the Alabama Supreme Court to reverse a child custody order granted in favor of her

[156] *Id.*

[157] *Id.* The dissent felt the punishment inflicted by the mother constituted child abuse. *Id.* at 584 (Dore, J., dissenting).

[158] 304 N.W.2d 58, 61 (1981).

[159] *Id.* at 60.

[160] *Id.*at 62.

[161] *Id.*

[162] *See, e.g.*, R. Collin Mangrum, *Exclusive Reliance on Best Interest May be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 Creighton L. Rev. 25 (1981).

ex-husband.[163] The mother believed that the lower court granted the change in custody based solely on her religious beliefs.[164] She had remarried and moved her daughter to an isolated rural area, far from her ex-husband and extended family, in order to be closer to her missionary work.[165] Following what they believed to be the Biblical standards of childrearing, the mother and her new husband used corporal punishment on the child and alienated her from her father and grandparents.[166] The Alabama Supreme Court quashed her petition for custody, because it found that the lower court had not used her religious beliefs as the "sole determinant" in the custody award and the evidence presented was sufficient to establish the change in custody would be in the child's best interest.[167] The *Snider* court was careful to avoid infringing on the mother's free exercise of religion, although the dissent argued the order impermissibly restricted her right to control her child's religious upbringing.[168] This case illustrates the fine line that judges must walk in balancing the competing interests to which they are constitutionally bound in child custody cases.

Families transmit their religious values to their child, which results in a continuation of the faith. Much like ICWA's role in preserving tribal culture, religion serves to perpetuate the parents' religious convictions through the teaching of their children. While courts in the United States attempt to recognize and respect the various faiths, religion remains a controversial consideration in child custody disputes.

Conclusion

The best interests of the child standard governs private child custody determinations in the United States. The flexible standard incorporates a variety of factors to be considered and evaluated. While family law is generally a matter left to the state, federal law dictates two factors in the best interests analysis. Both of these factors incorporate the cultural aspects reflected in American diversity and demonstrate a fascinating intersection of family law and constitutional theory. Through enactment of ICWA,

[163] Ex parte Snider, 929 So.2d 447, 449 (Ala. 2005).
[164] *Id.* at 450.
[165] *Id.*
[166] *Id.* at 460 (Parker, J., dissenting).
[167] *Id.* at 459.
[168] *Id.* at 461 (Parker, J., dissenting).

Congress mandated consideration of tribal affiliation in specific custody cases involving Indian children. On the other end of the spectrum, the First Amendment limits the role that religion may play in private child custody disputes. The use of these cultural factors is debated and can be controversial when incorporated into a best interests analysis.

This Article does not take a position on whether the use of these factors actually ascertains the best interests of the child, but does encourage cultural competency in child custody jurisprudence. Since diverse families are the fastest growing segment of the United States' population, the consideration of cultural issues will likely pervade future private custody decisions. Successful adjudications will require more than simply embracing the nation's diversity. They will compel a recognition of the major influence culture has on parenting practices and necessitate an understanding of differing values, norms, traditions, and beliefs of the parties involved in custody determinations. Contemporary child custody jurisprudence seeks to synchronously protect children's welfare and preserve their heritage. The best interests of the child standard grants trial courts great discretion and challenges secular judges to allow children "to learn who they are." Society is interested.

Jan Darpö

Biological Diversity and the Public Interest

On the encounter between traditional Swedish perspectives on Non-Governmental Organisations' access to justice in relation to nature conservation and species protection and the modern development within EC law and international agreements.

1 Introduction

This article concerns the question of who represents the public interest in relation to biological diversity. The traditional perspective in Swedish legislation in this area is that the prerogative for defending the public interest resides exclusively with the environmental authorities. As a result of this standpoint, other entities have no say on decision-making or participation in legal proceedings on such "green" matters. Countries such as the United States, and many other Member States in the European Union, have taken a different view – which perhaps can be regarded as more of a "Western" perspective.[1] Here it is argued that the NGOs have an important role to play in the control of environmental legislation and in the way that it is accomplished and enforced. Furthermore, this perspective is already prevalent in international environmental law, and is most

[1] I use the expression "Western" as referring to a wide scope of standing for NGOs in green cases (see Jóhannsdóttir, A: Miljødemokrati – offentlighedens deltagelse i beslutningsprocessen. Inledning på Nordiska juristmötet i Køpenhamn 2008. Skrift från det 38. Nordiska juristmötet 21–23 augusti 2008. Den Danske Styrelse. Kandrups Bogtrykkeri A/S, Bind I (2008).

clearly expressed and elaborated on in the 1998 Aarhus Convention.[2] Moreover, modern EC law in this sphere is strongly influenced by this way of thinking. In this article, the Swedish position is compared with the requirements of EC law and the Aarhus Convention in relation to access to justice on decision-making concerning nature conservation and species protection. The author's position is that the traditional Swedish concept of environmental authorities retaining sole jurisdiction in terms of defending the public interest can survive neither the demands of EC law supremacy nor current international demands for access to justice.

2 Protection of nature and endangered species

2.1 Swedish traditions on nature protection

All Scandinavian countries have long-established traditions regarding the preservation and maintenance of nature. The first law on nature reserves was introduced in Sweden in 1909, and in the opening decades of the twentieth century regulations were introduced on the protection of species close to extinction. For example, hunting the golden eagle was prohibited in 1924. In parallel with the development of the welfare state after the Second World War, Sweden enacted modern laws on nature protection, focusing on the exploitation of sensitive areas surrounding cities and along coasts and in mountains. Provisions protecting shores against over-exploitation came into effect as early as 1947 and 1951. The Nature Conservancy Act of 1964 introduced several new legal instruments in this area. Modern methods in forestry, such as clear cutting and ploughing, required new rules on general considerations with regard to nature and endangered species in the new Forestry Act of 1979. This legislation reinforced the position of the Forest Agency as the national authority in this sphere.

The traditional viewpoint in our country – as in most Northern European states – is that the environmental authorities uphold the public interest concerning "green" issues. However, from the very beginning the Swedish legislature accepted the entitlement of other entities to participate in decision-making in such cases. Consequently, between 1952 and 1967, three non-governmental organisations (NGOs) had the right to

[2] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, Denmark, 1998-06-25, 2161 UNTS 447).

appeal decisions in accordance with the provisions of the Nature Conservancy Act and its predecessors. These organisations were the Society for Nature Conservation, the Royal Academy of Sciences and the Local Heritage Movement.[3] However, this ended with the establishment of the Swedish Environmental Protection Agency (SEPA) in 1967. From the outset, it was made clear that SEPA would hold the sole legal capacity of representing the public interest, as it relates to environmental issues. With that change in approach came the possibility for SEPA to appeal all kinds of decisions made by various other authorities on green issues. But the legislature went even further – because SEPA was now to be the sole defender of the public interest, the previous access to justice for the NGOs was eliminated.

This new perspective on the role of the NGOs became customary in our country for a long time. Over the years, there were suggestions that they should be allowed to regain their former standing, but to no avail. The Government was not interested. Its philosophy was that participation in decision-making should be open to all, but the right of appeal should be a privilege open only to the authorities. That point of view was reinforced by the close cooperation existing between public authorities and landowners in relation to nature and species protection. This "road of voluntariness" was for many years successful in convincing landowners to protect large areas for posterity. The drawback was that other representatives for "the green interests" had no say in decision-making.

The first changes to this practice occurred with the Environmental Code of 1999. With the Code came the possibility of certain NGOs appealing decisions made in environmental cases. However, this only affects decisions involving "permits, approvals or exemptions".[4] Furthermore, the requirements for such "status" are strict: the organisation in question is required to have 2,000 members and to have been active in Sweden for three years. Furthermore, it can only consist of one limited type of non-profit association.

[3] Svenska Naturskyddsföreningen, Kungliga vetenskapsakademin and Samfundet för hembygdsvård (KK 1952:821).

[4] Chapter 16 sec. 13 Environmental Code (1998:808).

2.2 The European network Natura 2000

Together with national legislation on nature protection and endangered species, green issues have raised substantial concern on the part of the European Union. The EU's viewpoint is that the protection of habitats and species is of mutual interest to all European countries and accordingly is a matter best administered on a supranational level. Starting in 1979, a wide network of protected areas – Natura 2000 – has now been built up throughout Europe. Two EC directives on the protection of nature and species, the Birds Directive of 1979[5] and the Habitats Directive of 1992,[6] created the network. These directives have implemented international obligations that the Union has undertaken on behalf of its Member States.[7] The network consists of areas designated by the Member States for the purpose of protecting those habitats and species listed in the Annexes of the two directives. In all, more than 170 habitats (nature types) and 900 species of plant and animal life – some of which are so-called priority nature types, or species – demand special attention. The contributions of Member States depend upon the size, number and share of habitats and species existing in the territories concerned, and on the number of areas required to maintain a favourable conservation status.

The key provision of granting protection under Natura 2000 is found under Article 6 of the Habitats Directive. Article 6.1 of the directive is a traditional nature conservation provision in relation to designated areas, where Member States are required to undertake any necessary and appropriate measures corresponding to the ecological needs of the habitats and the species present on the area in question. According to Article 6.2, appropriate steps shall be taken to avoid a significant decline in habitats and the disturbance of species. EU case law established by the European Court of Justice (ECJ) requires that this perspective should also be applied to ongoing activities.[8]

[5] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

[6] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

[7] Two international conventions dominate the area; the Ramsar Convention on wetlands (Ramsar, Iran, 1971-02-02, 996 UNTS 14583) and the Convention on the conservation of European wildlife and natural habitats, the so-called Bern Convention (Bern, Switzerland, 1979-09-19, CETS 104).

[8] C-392/97 *Irish salami*, C-117/00 *Owenduff* and C-441/03. Case law from ECJ is found on the website EUR-lex (http://eur-lex.europa.eu). However, the easiest way is

Article 6.3 stipulates that any plan or project which – either individually or in combination with other plans or projects – is likely to have a significant effect on a Natura 2000 site must be subject to appropriate assessment of its implications in view of the conservation objectives for that site. The competent national authorities may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site. Thus, Article 6.3 contains three obligations. First, to decide whether the plan or project is likely to have a significant effect on the site. Second, to assess the implications of the plan or project on the site concerned in light of the conservation objectives for the area. And third, to agree to the activity only after having determined that there will be no adverse effects. Those three steps – which can be described as *screening*, *assessing* and *deciding*[9] – together lend practical meaning to the precautionary principle, which is one of the basic principles of European law, as stated in Article 174(2) in the Treaty Establishing the European Union (EC).[10]

Finally, according to Article 6.4, despite the fact that a plan or project might contain harmful implications for the particular site, it can still be permitted, though under strict conditions. No reasonable alternative solutions must be available. If the activity in question claims precedence or superiority over the public interest, then there must be imperative reasons for its doing so. Compensatory measures, if necessary, must be in place to ensure that the overall coherence and integrity of Natura 2000 is protected. If the particular site hosts a priority habitat or species, the plan or projects concerned can only be carried out for reasons relating to human health, public safety or environmental benefits or after a hearing of the European Commission.

Listed birds and species exist not only within Natura 2000 sites but in all parts of the Union. The Birds Directive and the Habitats Directive therefore also contain provisions on the protection of species *per se*,

to google on the Celex number, which for cases are ***6****year****J****number (four digits)*. Accordingly, the Celex numbers for the cases in this footnote are *61997J0392, 62000J0117* and 62003J0441. The Celex number for a EC directives is ***3****year****L****number (four digits)* and for an opinion of the Advocate General ***6****year****C****number (four digits)*.

[9] Tegner Ancker, H: *The precautionary principle and nature conservation law* in Implementing the precautionary principle (ed. de Sadeleer). Eartscan (London) 2007, p. 270.

[10] See de Sadeleer, N: *The precautionary principle in European community health and environment law* (ibid, p. 10).

together with their living and resting areas. For example, Article 12 of the Habitats Directive demands that Member States establish a system of strict protection of listed species in their natural range, prohibiting all forms of deliberate capture or killing. The national systems must also guarantee that these species shall not be disturbed, particularly in periods of breeding, rearing, hibernation and migration, and nor shall there occur the deliberate destruction or taking of eggs, and the deterioration of breeding sites or resting places. Article 16 of the Habitats Directive leaves open only very limited possibilities for Member States to derogate from this prohibition. This can only occur if there is no satisfactory alternative and the proposed measure are not detrimental to the favourable conservation of species status within their natural range. Under such conditions, Member States may derogate from Article 12 only (a) in the interest of protecting wild fauna and flora and conserving natural habitats; (b) in the interests of public health and public safety to prevent serious damage; (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest; (d) for the purpose of research and education; (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of listed species.

2.3 Natura 2000 in Sweden

Today in Sweden – as in many countries throughout Europe – the network Natura 2000 commands a dominating position in nature protection. Some 4 100 areas have been designated, totalling more than six million hectares covering almost 14 percent of the country. The designation of "Special Protection Areas" (SPA) under the Birds Directive is made by Government declaration. "Special areas of conservation" (SAC) under the Habitats Directive are designated in an intricate interaction between the Government and the European Commission. We have about 90 of the listed nature types, out of which 25 assume priority status. Some of the 90 listed nature types are common and widespread – for example, Western taiga. A little over 100 of the listed protected species regularly occur in Sweden, of which the wolf, the wolverine and Arctic fox are priority ones. However, birds have their own designations. We have about 60 species considered worthy of protection in accordance with the Birds Directive. These include the larger birds of prey, the stork, the lesser white-fronted goose and several types of woodpecker.

The implementation of the Habitats Directive in Sweden has been realised in phases. From the beginning the Government (as always, one might add) adopted the position that all is well in our country, and accordingly there was no need for new regulations in this area. The European Commission criticised that position and in 2001 the legislature secured a specific Natura 2000 permit regime.[11] To explain simply, permits are required under the same circumstances as are used in Article 6.3 in the Habitats Directive. Accordingly, a permit is compulsory for any plan or programme likely to have a significant influence or effect on a site of Natura 2000. On applying for a permit, the operator must deliver an Environmental Impact Assessment (EIA). This covers the biological issues at stake and the project or plan can only be agreed upon after the permitting body has satisfied itself that no damage will occur in relation to the protected interest. The system for the strict protection of species is in Sweden implemented in part by special species protection legislation[12] and in part by the legislation regulating hunting.[13]

In a way, one might say that the Natura 2000 network has overshadowed other and more national areas of nature protection. As we say in Sweden: "like the baby cuckoo which has eaten his siblings out of the nest", it has placed its hands on a substantial portion of public resources in this area. Of course, some of the work that has been accomplished has involved other and more "national" interests, such as nature reserves. However, it cannot be denied that much of the effort expended by the Swedish environmental authorities in the green area has gone to the EU Natura 2000 network.

2.4 The European Court of Justice and Natura 2000

The ECJ has heard many cases on Natura 2000 issues. In most of them, the Commission has brought an action against a Member State in accordance with Article 226 EC for either failure or delay in implementing the directives. Most of these cases concern the Birds Directive. This is hardly surprising and is partly due to the Birds Directive being the oldest. To some extent it is also because the procedure for designating areas according to that directive leaves more room for discretion than that of the

[11] Chapter 7, section 27–29b Environmental Code.
[12] The Species Protection Ordinance (2007:845).
[13] The Hunting Act (1987:253) and the Hunting Ordinance (1987:905).

Habitats Directive.[14] As a result many of the well-known cases heard in the ECJ in this field deal with Member States that have not designated the "most suitable territories" in accordance with Article 4.1 and 4.2 of the Birds Directive.[15] In the *Leybucht* case, the ECJ ruled that once an area had been designated, a Member State can not allow the protection afforded to deteriorate for the sake of economic interests.[16] This was repeated in the case concerning the Santoña Marshes in Spain,[17] where the court found that only ornithological criteria could be decisive with regard to which areas should be designated.[18] The ECJ has also established that the protection of "the most suitable areas" must be upheld, regardless whether or not such areas had previously been designated as Natura 2000 site by the Member State concerned. Furthermore, in the *Lappel Bank* case[19] the court asserted that economic and social factors must not be considered in arriving at a particular decision. On designated areas, information from NGOs can be useful as basic information for decision-making.[20] Furthermore, decisions made on those projects that might be liable to "significant effect" must proceed on a case-by-case basis. Member States must not use general exceptions or lists of activities, if it cannot be ruled out that such activities will cause damage.[21] The protection afforded must be provided by statute or regulation, mere agreements or contracts will not suffice.[22] Finally, it is insufficient reason that the area concerned and its surroundings happens to be public property.[23].

In the noted *Waddenzee* case, the court emphasised that Article 6.3 in the Habitats Directive contains a mandatory requirement that the assessments of plans and projects are made in an authorisation procedure.[24] This landmark case of Natura 2000 – which concerned mechanical cock-

[14] de Sadeleer, N: *Habitats conservation in EU law: from nature sanctuaries to ecological network*. Yearbook of European Environmental Law, Vol. 5 (Oxford University Press 2005), p. 215ff.
[15] E.g. C-103/00, C-75/01 and C-221/04.
[16] C-57/89 *Leybucht*.
[17] C-355/90 *Santoña Marshes*.
[18] This statement has thereafter been repeated in many cases, e.g. C-3/96, C-166/97, C-374/98 and C-209/04. For further examples, see de Sadeleer (p. 223ff).
[19] C-44/95 *Lappel Bank*.
[20] C-374/98 *Basses-Corbiéres*.
[21] C-72/95 *Kraaijeveld*, C-256/98, C-392/96 *Irish Salami*, C-143/02 and C-83/03.
[22] C-209/04, C-3/96.
[23] C-166/97 *Seine Estuaries*.
[24] C-127/02 *Waddenzee*.

le fishing in the Netherlands – dealt with many issues of vital importance. In relation to the demand for an EIA (*screening*), the ECJ stated that it must cover all activities for which one cannot *on the basis of objective information exclude that they will not have significant effects* on the site concerned (the "Waddenzee test").

Finally, when it comes to *deciding* whether or not the plan or project concerned will adversely affect the integrity of the particular site – only a few cases have reached the ECJ. The leading one relates to Wörschacher Moos in Austria, where the authorities had agreed on the extension of a golf course which destroyed one of the few feeding and resting areas for the corncrake in the Central Alps.[25] The court meant that the authorities at the time of the decision could not justify the finding that the proposed project would not significantly disturb the population in the area.

2.5 Unconditional and sufficiently precise

The ECJ's strict interpretation of the duties of Member States in accordance with Article 4.2 of the Birds Directive and Article 6 of the Habitats Directive have been described in the legal literature as that of the provisions having "direct effect". [26] The most suitable areas are to be protected (*Santoña Marshes*) and such protection follows directly from the provision in the directive (*Leybucht*). By comparison with the ECJ's judgment in *Kraaijeveld*, one can also reasonably conclude that the national authorities are obliged to consider the requirements of the Directives "ex officio" – that is, irrespective of whether or not any of the parties have invoked them.[27] The issue of direct effect, however, is best illustrated in the *Waddenzee* case.[28]

In that case, Advocate General Kokott specified that according to clear jurisprudence of the court, a provision in a directive has direct effect if it is "unconditional and sufficiently precise". In her opinion, this could be true of Article 6.2 and 6.3 in the Habitats Directive, since they were unconditional, at least in the situation that was to be judged in the case. Article 6.3 is based upon a number of conditions and legal consequences

[25] C-209/02 *Wörschacher Moos*.
[26] de Sadeleer p. 242.
[27] C-72/95 pp. 56–62.
[28] See also C-287/98 *Linster*, para 32, C-435/97 *WWF*, para 68 and C-72/95 *Kraaijeveld*, para 22–24.

that are precisely and clearly arrived at step-by-step. Even if there is room for Member States on the choice of measures to be taken, this still remains an issue that can be made the subject of judicial review. Kokott also considered that the correspondence between Article 6.2 and 6.3 of the Habitats Directive and those provisions in other directives where the ECJ had found direct effect was so much stronger than those that had been considered merely as programme documents.[29]

In its preliminary ruling in the *Waddenzee* case, the ECJ did not take a position on whether or not Article 6.2 of the Habitats Directive has direct effect. However, as to Article 6.3 the court stated:[30]

> "It would be *incompatible with the binding effect* attributed to a directive by Article 249 EC to exclude, in principle, the possibility that the obligation which it imposes *may be relied on by those concerned*. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, *the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts*, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, *has kept within the limits of its discretion set by the directive* (see Kraaijeveld and Others, paragraph 56). (emphasises added)

The ECJ's conclusion was that it is up to the national courts to determine whether or not the particular authority's decision authorizing a plan or a project has been made within the limits of discretion enjoyed in accordance with Article 6.3.[31] The court's judgment in the *Waddenzee* case can be said to represent a clear position that the provision has direct effect. However, a question remains as to its precise meaning.

[29] In other words, the parallel to the *WWF* case – which concerned Article 2.1 and 4.2 in the EIA Directive (85/337) – was much stronger, compared with the C-236/92 *Comitato*. The latter dealt with Article 4.2 in the Waste Directive (75/442). See Kokott in *Waddenzee* (Celex 62002C0127) para 128–137.

[30] *Waddenzee* para 66.

[31] *Waddenzee* para 70.

2.6 The primacy of EC law

The starting point for the doctrine of direct effect originally came in 1963 in the case of *Van Gend en Loos*.[32] From the beginning the ECJ applied this viewpoint – that if provisions of EC directives are unconditional and sufficiently precise, they may be relied upon before a national court – in relation to "rights" for individuals. The first cases on this question concerned competition, social security, consumer protection, and so on. In those situations, there is typically an easily identified actor able to trigger the case. Early on, however, the ECJ also found that the doctrine of direct effect should be employed with respect to environmental protection. Initially, this viewpoint was applied to health protection.[33] This is also the perspective in the Swedish legal literature, where the issue of direct effect has primarily been discussed in relation to individual rights for private persons.[34] One of the standard works in English on European environmental law – that is, Krämer, take the same perspective.[35] These examples deal with the possibilities open to neighbours to rely on EC air and water Environmental Quality Standards when challenging acts and omissions made by the environmental authorities.

However, in discussing Natura 2000, one cannot really talk of individual rights. The expression "direct effect" under these circumstances describes instead a broader concept, dealing with the "primacy of EC law".[36] This principle was manifested by the ECJ in the *WWF* case, meaning that whenever a provision in a directive is found to be unconditional and sufficiently precise, it must be applied in preference to any national legislation inconsistent with it.[37] Other leading commentators on European environmental law in English, Jans & Vedder, direct attention to the fact that the ECJ has found "rights" in all manner of provisions

[32] 262/62 *Van Gend en Loos*, REG 1963 p. 13.

[33] The ECJ's case law has developed from the *TA Luft* cases in 1991 (C-361/88 and C-59/89) to the *Janecek* case in 2008 (C-237/07).

[34] Mahmoudi, S: *EU:s miljörätt*. Norstedts Juridik, 2nd ed. 2002, p. 245 f., Michanek, G & Zetterberg, C: *Den svenska miljörätten*. Iustus, 2nd ed. 2008, p. 96 f.

[35] Krämer, L: *EC Environmental Law.* Thomson (Sweet & Maxwell), 6th ed. 2007, p. 433.

[36] See Prechal, S: *Directives in EC law*. Oxford University Press, 2:a uppl. 2005, p. 231 ff.

[37] C-435/97 *WWF,* para 68 and 70, the latter introduced with the words (my italics): "Consequently, if that discretion has been exceeded and the *national provisions must therefore be set aside on that account*, (…)".

dealing with quality of the environment and the duties of public authorities in this area. The authors accordingly argue that the issue of "rights" for individuals is a procedural rather than a substantive issue. To them, the concept of direct effect essentially means providing procedural mechanisms to the public to challenge administrative decisions on the basis of environmental quality requirements clearly provided under EC law.[38]

> The way the Court has extended the concept of direct effect in recent years justifies the assertion that the crucial criterion is whether a provision provides a court with sufficient guidance to be able to apply it without exceeding the limits of its judicial powers. Viewed thus, a provision of EC law is directly effective if a national court can apply it without encroaching on the jurisdiction of national or European authorities.

Viewed from this perspective, the rights of individuals and direct effect form two separate and different concepts. Rights for individuals become of interest mainly when claims for damages are made on a Member State for failing to implement correctly EC law. Moreover, the principle of direct effect goes farther than the Colson principle of loyal interpretation of directives, because it means that sufficiently precise provisions of EC law have primacy over national legislation under certain circumstances. However, such an effect does not apply in "horizontal relationships" – that is, between different individuals. The primacy of EC law must also be balanced against other basic principles, such as the principle of legal certainty, and must not encroach on legal rights of interest.[39] However, such rights are accorded a narrow interpretation and do not include granting an advantage to an individual by decision of a national authority. Such a "triangular" situation was illustrated in the renowned case of *Delena Wells*, where a neighbour succeeded in her action to challenge the permit of a quarry because the authorities had granted it in breach with the EC law.[40]

In summary, "direct effect" of EC law can be described as *"the obligation of the court or another authority to apply the relevant provision of Community law, either as a norm which governs the case or a standard for legal review*".[41] In other words, it is a matter of the authority flowing from

[38] Jans, JH & Vedder, HHB: *European Environmental Law*. Europa Law Publishing, 3rd ed. 2008, Chapter 6, citation on p. 168.
[39] Kokott in the *Waddenzee* case (62002C0127), para 149.
[40] C-201/02 *Delena Wells*.
[41] Prechal p. 241.

those provisions in EC laws that are unconditional and sufficiently precise. The national authorities and courts are obliged to apply the requirements of those provisions *ex officio.* In this way, the provisions can be used by all concerned parties, regardless of whether or not they provide "individual rights". The discussion therefore shift focus to the issue on *who belongs to this class of "concerned parties"* and on the *procedural autonomy* of the Member States.

2.7 The "protective law theory"

To discuss these issues in relation to nature conservation and species protection is not without difficulty, because the whole notion depends on the proposition that someone has standing to bring the case to a national court. And here, the procedural systems of the Member States of the European Union differ greatly.

First of all, an interesting confrontation with the traditional administrative "protective law theory" will occur. This "Schutznormentheorie" was originally developed in German jurisprudence but has also been employed in varying degrees in many other countries. According to this theory, a private party can rely only on his or her own interests in bringing a case: the interests of others affected by the decision – including the public interest – cannot be invoked. In the German version, the concerned person cannot invoke such "other" interests even when he or she has been allowed to challenge a decision on the basis of the existence of individual interests.[42] In other countries the protective law theory may instead determine who should be granted leave to appeal in certain cases. The most common situation occurs in cases on nature conservation and biodiversity, which are not considered to concern private interests and therefore cannot be challenged by individuals. Accordingly, from this standpoint the direct effect doctrine becomes a non-issue in relation to a case concerning Natura 2000 if there is no one affected in any personal capacity. Thus, in this situation if an authority makes an erroneous decision regarding the demands of the Habitat Directive, it cannot be challenged at all.[43]

[42] See Rehbinder, E in *Access to justice in environmental matters in the EU* (Ed. Ebbesson, J., Kluewer 2002), pp. 233 f.

[43] These issues are discussed more thoroughly in Darpö, J: *Justice through the Environ-*

EC law also demonstrate this line of argument. In the *Waddenzee* case, the General Advocate (Kokott) suggested that the direct applicable provisions of EC Directives could be divided into two categories: those that carried rights of prohibition and those that gave grounds for entitlements. Only in relation to the latter were Member States obliged to provide a procedural entrance for concerned parties. For the provisions that carried rights of prohibition, individuals may rely on the EC provision *only in so far as avenues of legal remedy against infringements were available under national law*.[44] But the ECJ did not follow Kokott's reasoning. Instead, the court repeated its mantra from previous case law that individuals must be able to rely on the directives before their national courts.

It is debatable as to what conclusions one can draw from this statement. The judgment, however, is clear in that the ECJ did not wish to bind itself to the viewpoint that it is up to the Member States to provide for legal means in those cases where there are no "individual rights" or concerned persons in the traditional sense. It is also noteworthy that the ECJ has utilised the same perspective in several cases brought by environmental NGOs. So if there is to be any real meaning in discussing the notion of direct effect in relation to green issues, *then someone must be able to bring such questions to court.* This is not a problem in those Member States that offer a system of judicial review widely accessible to the public. This is, for example, the case in the Netherlands, where an environmental NGO, Nederlandse Vereniging tot Bescherming van Vogels, initiated the *Waddenzee* case. Furthermore, in the UK, NGOs have a far-reaching standing that has been established by case law. It is hardly a coincidence that Friends of the Earth (UK) and the Royal Society for the Protection of Birds (RSPB) have initiated many of the more celebrated cases in the ECJ on the Birds Directive and the Habitats Directive. It was the latter organisation, for example, that was responsible for the action for judicial review in the *Lappel Bank* case.[45] However, this is not the general picture all over the Union. As mentioned above, in some Member States NGOs have little or almost no standing in green cases.

mental Courts. Lessons learned from the Swedish experience. In Environmental Law and Justice in Context (Cambridge University Press 2009), p. 176.

[44] C-127/02, para. 140–144.

[45] For Swedish cases, see MÖD 2001:29, MÖD 2005:8.

Finally, it is also noteworthy that the situations in the Member States differ when it comes to *what kind of case* the public concerned can bring to court. In many systems, the courts' control of the administration is mainly triggered in relation to specific decisions. In others, the public concerned also has access to "abstract norm control". This was clearly illustrated in the *TOS* case, where an NGO brought an action for misuse of powers ("detournement de pouvoir") against the French Ministry of the Environment.[46] The NGO sought annulment of certain decrees concerning fish farming, claiming that they failed to fulfil requirements for an authorisation procedure in accordance with Directive 2006/11. The French Conseil d'État made a reference for a preliminary ruling and the ECJ confirmed the standpoint that those kinds of fish farming operation must be subjected to permits. In other Member States, this kind of case simply cannot by brought to court. Although one cannot argue that the possibility of abstract norm control generally is a requirement under EC law – or required by the European Convention of Human Rights for that matter[47] – one might say that the national system must provide *some effective legal remedy* in similar situations.[48] A reasonable conclusion to be used in the following discussion is therefore that actions and omissions by public authorities dealing with EC law having direct effect must be possible to challenge before a national court. Dealing with nature conservation and species protection, the crucial question to be considered is to what extent the environmental NGOs enjoy such access in the national courts of the Member States. Before attempting to answer that question, one must also consider the fact that the EU – together with most Member States – has signed the Aarhus Convention. This Convention establishes international standards for information, public participation and access to justice in environmental matters. The "Aarhus effects" on the subject of this article – the public interest and biological diversity – must be described in order to make the picture more complete.

[46] C-381/07 *Association nationale pour la protection des eaux et rivières – TOS.*

[47] European Court of Human Rights' (ECHR) judgments in the cases *Norris v. Ireland*, *Klass v. Germany* and *Västberga taxi v. Sweden*.

[48] C-432/05 *Unibet*, para 37.

3 The Aarhus Convention

3.1 General points about the Aarhus Convention

The Aarhus Convention is built on three "pillars": *access to information*, *public participation* in decision-making procedures and *access to justice* in environmental matters. The preamble to the Convention emphasises the importance of a close relationship between environmental rights and human rights, and that all three pillars are of decisive importance for sustainable development. The ideas forming the pillars are intertwined to form an entirety, a basic viewpoint advanced in the Implementation Guide of the Convention:[49]

> "Public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement, through access to justice under the third pillar."

The Aarhus Convention is relatively short, containing only 22 Articles. Like many international instruments, it starts with a general part, including a provision laying out the objectives (Article 1), largely reflecting what was earlier stated in the preamble. In this part, there are also some definitions (Article 2) and general provisions (Article 3). The definition of environmental information is broad, including information from decision-making procedures. Of particular interest for this article are the definitions of the "public" and the "public concerned". The broader concept "public" is defined as natural or legal persons, and, in accordance with national legislation or practice, their organisations and groups. The "public concerned" means the public most likely to be affected or having an interest in environmental decision-making. The definition also includes NGOs promoting environmental protection and meeting any requirements under national law. It should be noted that the expression "public authority" also refers to regional institutions such as the European Union. The general provisions make clear that the provisions of the Convention constitute a floor ("minimum provisions") that do not prevent the Parties from maintaining or introducing enhanced information, wider participation and more effective access to justice than that required by the Convention (Article 3.5). Article 3.9 essentially prohibits discrimination on the basis of citizenship, nationality, domicile or registered seat.

[49] *The Aarhus Convention – An Implementation Guide*. Economic Commission for Europe/UN 2000.

The first pillar – access to information – consists of two parts, passive and active information. The first concerns the right to seek information from public authorities. The second is about the obligation on the part of authorities to collect and dispense information to the public.

Public participation constitutes the second pillar. Under Article 6, the public is guaranteed the basic right of participation, which today is associated with most national and international EIA procedures. This includes elements such as promulgating public notice in the early stages of decision-making, providing information on applications (including an assessment of their environmental impacts), providing information about the operators and authorities involved, advertising public hearings, informing the public about how to submit comments, clarifying time frames, and so on. The right to participate, however, only applies to authorisation decisions relating to certain activities, listed in Annex 1 to the Convention (Article 6.1.a). Paragraphs 1–19 in the Annex lists those operations and installations relating to industrial activities possessing the potential for a major impact on the environment.[50] However, the list ends at paragraph 20, which covers any other activity where public participation is provided for under an EIA procedure in accordance with national legislation. In addition, the demand for public participation also covers all other activities that may have a significant effect on the environment (Article 6.1.b).

The Aarhus Convention's demands for access to justice are expressed in Article 9.2–9.4. According to Article 9.2, the public concerned have the right of access to a review procedure before a court of law, or other independent body established by law, to challenge the substantive and procedural legality of acts or omissions under Article 6. However, this provision does not exclude the possibility of a preliminary administrative review procedure or a requirement of exhaustion of such procedures prior to judicial recourse. In addition, members of the public should have the possibility of access to administrative or judicial procedures to challenge any acts or omissions by private persons and public authorities believed to

[50] These include, for example, nuclear power stations, steel plants, metallurgical processes, installations for the production of glass and ceramic products, chemical industry, waste management, landfills, waste water treatment plants and paper industry. It also includes infrastructural projects (railways, motorways, waterways and ports), dams and other water works, extraction of oil and gas, intense farming, quarries and opencast mining, electric power lines, storage of petroleum and a number of other activities entailing environmental risks.

have contravened national law concerning the environment (Article 9.3). The remedies thus demanded must be both adequate and effective, including the possibility of injunctive relief. They must also be fair, equitable, timely and not prohibitively expensive to pursue (Article 9.4).

The Convention's tenth anniversary was in 2008, and in June of that year the third Meeting of the Parties was held in Riga, Latvia. The meeting declared that the Convention had won wide acceptance. No fewer than 42 states had signed it and a further 12 were preparing to do so. The meeting in Riga also confirmed that there is a continuing need to enforce public rights in relation to environmental decision-making.[51]

3.2 Implementation in Europe

As stated earlier, both the European Union and most Member States have signed and ratified the Convention. Accordingly, the EU has decided on a number of directives, or provisions within directives, implementing the Convention. In relation to the first and second pillars, the most important pieces of legislation are Directive 2003/4 on public access to environmental information[52] and Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.[53] The latter also contains Aarhus amendments in two fundamental EC directives in the environmental area – that is, the EIA Directive[54] and the IPPC Directive.[55] In 2003, the Commission also proposed a directive on access to justice.[56] In addition,

[51] See especially Decision III/3 on promoting effective access to justice (ECE/MP.P/2008/2/Add.5). All the Aarhus documents mentioned in this article are available on the website of the Aarhus Convention; www.unece.org/env/pp.

[52] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

[53] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

[54] Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.

[55] Council Directive 96/61/EC concerning integrated pollution prevention and control, today Directive 2008/1/EC.

[56] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters. COM (2003) 624 final (2003/0246 (COD)).

there is a Regulation to implement the Aarhus Convention in relation to decision-making by the Community and its constituent bodies.[57]

In Sweden, implementing the provisions of the Convention has served little practical purpose. The Government specifically declared that, for the most part, the legislative efforts were aimed at fulfilling demands for information and participation. In relation to the third pillar of the Convention, it wished to await the Union's processing of the proposal for a directive on access to justice before considering further measures to be taken.[58] In relation to the first pillar, a specific law on environmental information was introduced, which makes the Aarhus demands also applicable to certain (very few) private bodies carrying environmental information.[59] The provision on access to justice by NGOs in the Environmental Code has been expanded to certain other laws dealing with infrastructural projects, mining, electric power lines, and so on. A similar provision has been introduced in the Planning and Building Act, however, that only deals with activities that are relatively insignificant to the environment. Most important is the new possibility open to NGOs to apply for judicial review of governmental decisions in accordance with the Act 2006:304. Here, it is stated that NGOs, meeting the criteria of the Environmental Code, shall have the possibility open to them to challenge any such governmental decisions to which Article 9.2 of the Aarhus Convention applies.

3.3 General conclusions from the first decade of the Aarhus Convention

At the outset, I wish to point out that the text of the Convention is not very precise and is partly contradictory. This is particularly true of the two main provisions on access to justice, Article 9.2 and 9.3. Obviously, this is mainly due to the Convention being a result of negotiations between many parties. However, it is also quite clear that the Convention was written with a distinct civil law procedural perspective on decision-

[57] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

[58] Prop. 2004/05:65 p. 124 f.

[59] For the public authorities, the principle of administrative transparency applies in accordance with the Constitution (Freedom of Information Law from 1949).

making in environmental matters. The same is true of the Implementation Guide, which was published soon after the signing. These civil law procedural aspects are visible, for example, in the wording on injunctive relief and litigation costs.

However, this characteristic is counteracted by the enormous amount of attention the Convention has attracted and, from time to time, the intense debate concerning its provisions. Over the course of the ten years that have elapsed since its signing, vast amounts have been written and published on access to justice in preparatory works, reports, academic articles and anthologies, pamphlets and analysis, at both national and international level.[60] Furthermore, the European Commission has undertaken a number of studies on implementation efforts by Member States.[61] Most important, the Convention is equipped with a Compliance Mechanism that is rather unusual, to say the least.[62] There is a Compliance Committee, consisting of nine members, who have been nominated by the Parties and NGOs, and elected at the Meeting of the Parties. The Committee is independent, because its members are judges and legal scholars and sit in their personal capacities for six years. The Compliance Mechanism of the Aarhus Convention has a "public trigger", meaning that the public can communicate complaints about breaches against the provisions. All communications and meetings among the Committee,

[60] I wish to draw attention to *Access to justice in environmental matters in the EU*. Ed. Ebbesson, J. (Kluewer 2002), de Sadeleer & Roller & Dross: *Access to justice in environmental matters and the role of the NGOs.* (Europa Law Publishing 2005) and *How far has the EU applied the Aarhus Convention?* (Ed. Hontelez) European Environmental Bureau (EEB) 2007.

[61] Among other reports, a comprehensive study of the Member States implementation of Article 9.3: *Summary report on the inventory on the EU member states' measures on access to justice in environmental matters.* Milieu Environmental Law and Policy, Bryssel 2007. However, national contributions differ in quality, and some have been questioned, e.g. by professor Peter Pagh at the University of Copenhagen. The report, Pagh's and other communications are published on the website of the European Commission: http://ec.europa.eu/environment/aarhus/study_access.htm.

[62] Kravchenko, S: The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements. Colorado Journal of International Environmental Law and Policy. No. 1, 2007. Also Wates, J: *The Aarhus Convention: a Driving Force for Environmental Democracy*. Journal for European Environmental & Planning Law (JEEPL), Number 1, 2005, pp. 2 and Koestler, V: *The Compliance Committee of the Aarhus Convention – An overview of procedures and jurisprudence*. Environmental Policy and Law (EPL), 2007 p. 83.

the complainant and the Party are open to the public.[63] Another advantage with the Compliance Mechanism is that the procedure is fast. From 2004 to date, the Commission has received 33 communications from the public and one complaint ("submission") between two Parties. Of these, 21 have been concluded (14 recommendations and seven dismissals). One must not underestimate the importance of Committee decisions. Although its statements are not binding, they play an important part in the understanding of the Convention and accordingly work as "interpretive factors" in the building of international norms in the field of environmental democracy.

Today one might draw some basic conclusions from all of this material. First, it is clear that the Convention is *built on three independent pillars*. Access to justice does not merely cover those situations where a member of the public has been denied information or excluded from participating in a decision-making procedure. Access to justice is also related to the merits of the case in question, the result of the decision-making. The difference between Article 9.2 and 9.3 is that the former covers authorisation decisions in accordance with Article 6 and Annex 1. Article 9.3 has wider coverage of all other forms of action and omission by both authorities and private parties in breach of national legislation in the environmental realm. In other words, while Article 9.2 deals with permit decisions, Article 9.3 deals on the one hand with activities undertaken by operators in a wide sense and on the other with decisions and – perhaps even more important – omissions from public authorities in supervisory matters.

One point that has been debated is whether the Convention *contains a "non-deterioration clause"*. Early on, in the Implementation Guide, it was argued that Article 3.6 – in comparison with the Sofia Guidelines produced during the preparation of the Aarhus Convention – should be understood as containing such a clause.[64] However, this does not follow from the wording of the provision, which merely states that the Convention does not *require* any derogation from existing rights of information, public participation or access to justice in environmental matters. The Compliance Committee discussed the issue in the decision on *Hungary* and stated that, when formulating Article 3.6, the negotiating parties did

[63] All documents are published on the Aarhus Convention's web site (http://www.unece.org/env/pp/).

[64] Implementation Guide pp. 46, 115, 119, 129.

not wish to completely exclude the possibility of reducing existing rights, so long as they did not fall below the level granted by the Convention.[65] Because the Committee regarded such a reduction as being at variance with the Convention, it recommended the forthcoming Meeting of the Parties to urge the parties concerned not to take such action. However, the meeting in Almaty in 2005 made no such declaration.[66] In my view, the conclusion to be drawn from this is that Article 3.6 is not to be taken as a non-deterioration clause.[67]

Furthermore, the Convention *does not pose any demand for "actio popularis"* – that is, a way open for everyone to challenge environmental decisions by legal means. Examples of such actions can be found in many states. The possibilities open to the public in UK to bring individual private prosecutions is perhaps one of the most important examples in Europe. In some of the Nordic countries, all inhabitants in a municipality can challenge the legality of certain decisions by politic boards and civil servants. However, such a procedural order is not required by the Convention, a point that was made clear in a decision from the Compliance Committee in a case concerning *Belgium*.[68]

Neither does the Convention require that individuals and NGOs have access to courts through *direct action in court*. The Convention requires access to justice, but is silent on the matter of how the Parties arrive at different solutions. This can be met by the existing procedural orders, but they must be able to fulfil the requirements of Article 9.2–9.4. The requirements should also be considered in relation to the entirety of the system. When deciding if a national system is in compliance with the Convention, one must consider both the opportunity to challenge decisions through appeal on the merits of the case, as well as through judicial review of legal issues. We must also understand the aims and purposes of the Aarhus Convention. In the decision on *Kazakhstan*, the Compliance Committee made clear that the Convention demands that the environmental legislation of the Parties must offer an opportunity for the public concerned to challenge by legal means the supervisory authority's

[65] Communication C/2004/4 (Hungary), para 18.

[66] Second Meeting of the Parties, decision II/5 para 3.

[67] This is also the conclusion drawn by the chairman of the Compliance Committee, Veit Koestler, in the above mentioned article in Environmental Policy and Law (EPL), 2007 p. 83, at p. 92.

[68] Communication C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para 35.

reluctance to take action against illegal activities. [69] Accordingly, when the text of the Convention talks of injunctive relief, the words must be "translated" and transformed into their equivalents in the administrative procedures that prevail in some countries – for example, Sweden and Finland.

3.4 Relationship between the Aarhus Convention and EC law/Member States' law

The relationship between the Convention and EC law has attracted a certain amount of attention. As mentioned earlier, both the European Union and the Member States have signed the Aarhus Convention. According to Article 300(7) EC, the institutions of the Community and the Member States are bound by international agreements concluded by the EU under certain conditions. Under this provision, the ECJ has developed a doctrine of direct effect of international conventions, similar but not identical to the criteria of *Van Gend en Loos*.[70] Most of the cases concern the

[69] Compliance Committee 2006-07-28 (C/2004/06 and C/2007/20 Kazakhstan). In this context, one may also mention that the Nordic countries made a statement when signing the Convention that might be understood as their thinking that the Parliamentary Ombudsman should be considered as an administrative recourse that fulfils the requirements of Article 9.3. I understand that this still is the Danish position (see Implementation report submitted by Denmark (ECE/MP.PP/IR/2008/DNK 4 April 2008), para 151). It might therefore be worth mentioning that this can hardly be said to be Sweden's standpoint today. In implementing the Convention, the Government had already stated that the scrutiny of the Ombudsman alone could not meet such demands, since it only covers activities by public authorities and offers no opportunity for injunctive relief (prop. 2004/05:65 part 9.5). The issue was also discussed during the implementation of the Environmental Liability Directive (2004/35, ELD), which contains two Aarhus provisions (Article 12 and 13). When those provisions were implemented in the Environmental Code, it was considered that the Ombudsman did not meet the requirements of Article 9.3 of the Convention, since a decision on his or her part was not binding and did not address the merits of the case (SOU 2006:39, p. 183 and prop. 2006/07:95, part 6.19). The Parliamentary Ombudsman has also repeatedly raised objections to any attempt to describe the institution as an administrative recourse in accordance with Article 9.3 of the Aarhus Convention (JO:s decision 2006-08-21 on the implementation of ELD (dnr 2116-2006), also decision 2007-11-12 (dnr 4560-2007) on the Implementation report 2008 submitted by Sweden (M2007/4342/R)).

[70] Hartley, T. C.: The Foundations of European Community Law. Oxford University Press, 6th ed. 2007, p. 183.

GATT agreement, which the court has found does not "confer rights".[71] However, in certain situations, the ECJ has found that sufficiently clear and unconditional provisions of international conventions concluded by the EU prevail over contradicting national legislation. This was illustrated in the case of *Étang de Berre,* which concerned the direct applicability of Article 6(3) in the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources (the Barcelona Convention).[72] The provision lays down an obligation to subject certain discharges to an authorisation decision by the national authorities. The ECJ began its findings by stating:[73]

> According to the settled case-law of the Court, a provision in an agreement concluded by the Community with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (…).

Because the Court found that the provision in the Convention clearly, precisely and unconditionally lays down an obligation for Member States, it was considered as having direct effect. Accordingly, any interested party is entitled to rely on it before a national court.

In conformity with this judgement, those provisions of the Aarhus Convention sufficiently clear and unconditional – and there are many – have direct effect and therefore should take precedence over any national legislation conflicting with them. The European Commission in the *EU* case advanced this argument before the Compliance Committee. The Commission meant not only that the Member States have to interpret EC law – for example, the EIA Directive – in the light of the Convention, but that in certain situations they also have to apply directly the provisions of the Convention. The Committee reiterated the Commission's position.[74] The idea of Conventions having direct effect is not very novel

[71] Craig & de Burca: EU Law. Oxford University Press, 4th ed. 2008, p. 206 ff.

[72] C-213/03 *Syndicat professionell coordination des pêcheurs de l'étang de Berre.*

[73] The judgment, para 39.

[74] Compliance Committee's decision 2006-06-12 in Communication C/2005/17 (*European Community*), ECE/MP.PP//2008/5/Add.10, 2 May 2008, para 23, 28 and 35. However, one must also take into consideration the fact that the European Community made a declaration on the approval of the Aarhus Convention, stating that Member States were responsible for the performance of Article 9.3 and would remain so unless and

in relation to those parties that belong to a monistic tradition. However, to my understanding, in those countries belonging to the dualistic tradition – that is, many countries in Western Europe – this in fact renders the system monistic in relation to provisions in international agreements that are sufficiently precise and unconditional.

The Committee also has highlighted another issue concerning the Union's external relationships. In the *Danish* case, the Committee made a statement about the expression "national law" according to Article 9.3. First, it noted that the Community's legislation in different ways constituted a part of the national law of the EU Member States, and, in some cases, national courts and authorities were obliged to consider EC directives even where they had not been fully transposed into national law by the Member State concerned. The Committee then declared:[75]

> "For these reasons, in the context of article 9, paragraph 3, applicable European Community law relating to the environment should also be considered to be a part of the domestic national law of a member state."

The use of the expression "applicable" is here ambiguous. It is one thing to assert that if the Council enters into an international agreement, certain provisions of that convention can by direct applicability become part of national law, even in dualistic Member States. However, it is another thing to say that such an agreement has an effect on the relation between secondary legislation of the Union and national law of the Member States. EC law is part of Member States' law according to Article 249 EC and the (extended) doctrine of direct effect. If the Compliance Committee means that the fact that the Union has signed the Aarhus Convention renders EC directives applicable in the Member States *to a wider extent* than follows from the doctrine of direct effect, I disagree. Furthermore, the consequences of such a position would be substantial. There are many general provisions in EC secondary law not having direct effect because they are not sufficiently precise and unconditional. According to such a viewpoint, those provisions must be open for the public concerned to challenge in court. This would not be a practical problem in those coun-

until the Community adopted legislation covering the implementation of those obligations (http://www.unece.org/env/pp/ratification.htm). The importance of this declaration on the issue debated here, remains to be seen.

[75] Communication ACCC/C/2008/18 (Denmark), ECE/MP.PP/2008/5/Add.4, 29 April 2008, para 59, reiterated in the Report 2008-05-22 to the third Meeting of the Parties (ECE/MP.PP/2008/5. para 65).

tries delimiting that class of person narrowly – for example, by demanding a connection between the decision and the actual effect on the interests of the complainant. However, as mentioned above, in some Member States the public has a much wider access to the courts in environmental matters. In such states there will be a difference, because actions and omissions of private parties and public authorities in breach of provisions in EC directives not having direct effect would become possible to challenge in the courts. However, if the Committee only meant to say that those provisions in EC law having direct effect are part of national law, the conclusion is uncontroversial.

4 Encounters between traditions and international obligations

4.1 Analysing the encounter

In the final section of this article, an analysis will be made between international demands on access to justice in relation to biological diversity and the legal situation in Sweden. First, I shall conclude what the requirements from the Aarhus Convention and EC law mean with regard to nature conservation and species protection. I shall then compare those requirements with the legal position in our country. Finally, I make a short remark about the role of the Swedish courts on this area.

4.2 The requirements from international law on standing in green issues

To my understanding, the Aarhus Convention is clear on the issue of access to justice concerning decision-making in relation to nature conservation and species protection. On permit decisions, according to Article 9.2, someone must be able to bring an action to defend green interests, either directly against the operator or against the authority in charge. The same goes for acts and omissions that contradict national legislation (Article 9.3). The Compliance Committee illustrated this in the *Danish* case. The complainant was denied access to justice because Denmark failed to enable him the possibility of challenging in court a municipality's decision on the culling of rooks (protected by the Birds Directive). However, the Committee stated that the mere fact that the private person

could not challenge such a decision did not constitute a breach of the Convention, *but some member of the public must be able to do so*.[76] An explicit condition of this position was that the Danish courts would continue to allow for NGOs to have standing in such cases.[77]

The position of EC law is more complicated. On the one hand, we have the EC law demand for primacy described above, and on the other, there is the notion of procedural autonomy – meaning that it is up to each Member State to develop its own system for decision-making and judicial review. However, the national systems must be based upon the principles of equivalence and effectiveness. The meaning and intention of those principles is that there has to exist the possibility of a *fair trial*[78] on the matter that is *effective*;[79] that the procedure is not *less favourable* than those governing similar situations where there has been a breach of domestic legislation; and that the particular system does not *render it impossible* in practice, or excessively difficult, for the parties concerned to execute rights conferred by EC law. When one applies this perspective on the green area, it becomes difficult to reach a conclusion other than that actions and omissions by operators and public authorities dealing with EC law having direct effect must be possible to challenge before a national court by the public concerned, including environmental NGOs. This standpoint was firmly taken by Advocate General Sharpston in the *DLV* case (C-263/08, see part 4.6 below), which concerned the possibility open to a small NGO to appeal a permit to which the EIA Directive was applicable. She argued that, even if there had not been a specific provision such as Article 9 of the Aarhus Convention or the similar one in the EIA Directive, it is incompatible with EC law to deny the NGO access to justice in the case:[80]

> The case-law of the Court contains numerous statements to the effect that Member States cannot lay down procedural rules which render impossible

[76] Communication ACCC/C/2008/18 (Denmark), ECE/MP.PP/2008/5/Add.4, 29 April 2008, para 32.

[77] Referring to a decision by the Vestre Landsret about Danmarks Sportfiskerforbund, U.2001.1594V.

[78] C-87/90 *Verholen,* p. 27.

[79] C-413/99 *Baumbast*.

[80] Sharpstone in the *DLV* case (62008C0263), para 80. In the paragraph, she also referred to the jurisprudence of ECJ concerning the principle of effectiveness, C-430/93 and C-431/93 *Van Schjindel and van Geen*, C-129/00 *Commission v. Italy,* C-432/05 *Unibet* and C-222-225/05 *van der Geerd.*

> the exercise of the rights conferred by Community law. Directive 85/337, which introduces a system of environmental assessment and confers rights, would be stripped of its effectiveness if the domestic procedural system failed to ensure access to the courts. The present case is clear proof that, given that access to justice is made impossible for virtually all environmental organisations, such a measure would fall foul of the Community law principle of effectiveness.

Obviously, others may reach the conclusion that it is up to the Member State in question to decide access to justice in such cases. However, as that position implies that important decisions on EC law in a Member State could never reach the ECJ, I find it hard to see how that would comply with EC law. Furthermore, that position is in clear conflict with the fact that the Union itself has signed and ratified the Aarhus Convention. Thus, the point of departure in the following is that decisions concerning Natura 2000 must be challengeable in court in accordance with Article 9.2–9.4 in the Aarhus Convention. As stated earlier, the key issue here is the possibilities open to NGOs to represent the public interest, and their access to justice in relation to the demands of the two EC directives.

Having said all this, the dominating question in the following is whether or not Sweden is fulfilling its obligations under EC law on Natura 2000. It is my considered view that the present Swedish system has four systemic problems with regard to compliance with international obligations in this area.

4.3 Natura 2000 decisions

The structure of the requirements in Article 6.3 in the Habitats Directive – that is, screening, assessing and deciding – together with clear statements from the ECJ on the matter, means that the authority's position on the effects of projects and plans in reference to a Natura 2000 site must be given in a formal authorisation, that is, in a permit decision. Before the authority can issue such a permit, there has to be an EIA on the biological effects. According to the basic principles of EC law, Member States cannot avoid this demand by labelling the assessment as something else, because EIA is a self-contained legal concept. The Natura 2000 protection of Sweden is implemented by a specific permit regime in the Environmental Code. The possibility remains open to environmental NGOs to challenge, by legal means, any such permit decision if it repre-

sents a breach in the law.[81] So far, this order complies with Article 6.3 in the Habitats Directive.

Difficulties arise when the relevant authorities make no decisions. Such omissions can be in contravention of the duty, in accordance with Article 6.2, to initiate the updating of conditions in a Natura 2000 permit. An omission can also concern enforcement or supervision. This can be illustrated by the decision-making of the Forest Agency. According to the Forestry Act, persons engaged in a clear-cutting project over a certain size must notify the authority. Such a project could typically entail significant effects on a Natura 2000 site. When the authority receives the notification, it decides in a so-called "advice" as to whether a permit is required under Natura 2000 provisions. In accordance with the Environmental Code, such a permit application is made to another authority, the County Board.[82] Sometimes the Forest Agency will even insert conditions in its decision to ensure that the particular project will not be subject to an obligation to apply for a permit. Even though these advice documents are administrative orders in accordance with the Code, none can be challenged by environmental NGOs. In fact, the Swedish administrative system concerning Natura 2000 is full of such predicaments, where decisions are made that can never be challenged by "outsiders". It goes without saying that such a state of affairs is problematic if Article 6.3 of the Habitats Directive is to be given direct effect, because NGOs must retain the possibility of challenging omissions by environmental authorities.

4.4 Legislation outside the Environmental Code

NGO access to justice is not provided by important environmental legislation outside the Code, such as the Forestry Act and the Planning and Building Act. There have been a number of cases in the Supreme Administrative Court illustrating that building development often con-

[81] More precisely, the Swedish environmental procedure allows a complainant to invoke all questions, as the procedure is reformatory, meaning that the trial is full and the court decides on the merits of the case.

[82] Actually, the Forest Agency cannot decide on this matter, as it is the responsibility for the landowner – under criminal liability – to decide whether or not there is a duty to apply for a permit. Nevertheless, the system is waterproof for the landowner, as no attorney will prosecute after a "to go" decision from the Forest Agency, as negligence is difficult to establish in such situations.

cerns vital Natura 2000 interests.[83] Quite often, the municipalities – which are responsible for planning and building – are not too concerned with the effects on biological diversity resulting from such projects. The absence of any opportunity to legally challenge decisions of this sort must also be considered to be a major deficit in the Natura 2000 system in Sweden.

Another important piece of legislation residing outside the Environmental Code is the legislation on hunting. Although vital parts of the Habitats Directive are implemented by this legislation, decisions in accordance with the Hunting Act cannot be challenged by NGOs. The devastating effects of this circumstance have been illustrated by recent legislative reforms to increase the hunting of wolves and lynx in Sweden.[84] After having negotiated with the Commission, the Government introduced an interpretation of its own of the Directive's possibilities to derogate from the strict protection of these species. According to the new regulation, the County Boards will have the opportunity of deciding on "protective hunting" on a regional basis. The support for this view is said to be Article 16.1.e of the Habitats Directive. To say the least, it is unclear how the Government could reach this conclusion. Neither the wolf nor the lynx have favourable conservation status in Sweden. To authorise the hunting of these species, without first establishing that it would in fact prevent serious damage to crops or livestock etc., is clearly in breach of the Directive, as shown in the *Finnish wolf* case.[85] The Government has defended its position by claiming that Sweden has strong traditions of defending livestock from wolf attacks and that the ECJ accepted regional decisions in the above-mentioned case. What it failed to state was that NGOs in Finland have the authority to appeal regional decisions right up to the national level, while this is not allowed in Sweden. What we see here is a controversial example of "jurisprudence through the Commission". These cases will never reach the ECJ, since the Commission – according to the Swedish Government – has promised not to bring action and the decisions cannot be brought to court by NGOs or any other entity representing the public interest.

[83] RÅ 2005 ref. 44 and RÅ 2006 ref. 88.
[84] Prop. 2008/09:210 En ny rovdjursförvaltning.
[85] C-342/05 *Finnish wolf* case.

4.5 Governmental decisions

Another related issue concerns governmental decisions on Natura 2000. Such decisions deal mostly with larger projects or plans. As mentioned above, governmental decisions can be challenged by means of judicial review by NGOs within the provisions of Act 2006:304 if the decision in question is "such as to which Article 9.2 of the Aarhus Convention is applicable". Decisions by the Government are crucial for these projects because they bind authorities and courts in subsequent proceedings. This order can be problematic, both in relation to the European Convention of Human Rights and from a general EC law perspective, because in certain situations it denies stakeholders the opportunity for a fair trial on matters concerning them.[86] That issue lies outside the scope of this article and accordingly will not be pursued further. However, I raise the same objections to these decisions as I discussed in relation to the advices documents from the Forest Agency. Government omissions, that is, a finding that a project does not require a Natura 2000 permit, cannot be legally challenged. However, in relation to governmental decisions this might constitute less of a problem, because the provision on standing in Act 2006:304 opens the way for the Supreme Administrative Court to define the scope and limitation in accordance with Article 9.2. But if the court does not apply a systematic viewpoint on this issue, such situations become fraught with difficulty.[87] Unlike most other legal systems having recourse to judicial review, this possibility is not open to authorities in

[86] This is illustrated clearly in the *Botnia* case (RÅ 2004 ref. 108 and RÅ 2008 ref. 89), where the stakeholders have initiated legal proceedings in ECHR. In *Borelli* case (C-97/91 para 14), the ECJ stated that the "requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.".

[87] Clearly, the Supreme Administrative Court does not always apply a systematic perspective. This was illustrated in the *Botnia* case, which dealt with Article 6.4 of the Habitats Directive. On appealing the Government's second decision, the court found that the derogation from the strict protection of the site was already decided and that that decision could not be challenged, despite the fact that the NGOs were not permitted to appeal the first decision. Thus, the Government's derogation decision was never reviewed in court. One member of SAC did not agree, and she wanted to quash the decision on the grounds that it breached the requirements that the ECJ set up in the *Castro Verde* case (C-239/04).

Sweden.[88] So if the Supreme Administrative Court finds that NGOs cannot take action, then nobody can – unless there is a very persistent neighbour in the vicinity. Unfortunately for Natura 2000 interests, this is seldom the case regarding large projects concerning high degrees of biological diversity – for example, in mountain or sea habitats.

4.6 Criteria for NGO standing

Finally, and perhaps obviously, decisions concerning Natura 2000 can only be challenged by a small number of large-scale organisations. According to the Environmental Code, only certain kinds of non-profit associations with 2000 members can appeal or take action for judicial review. The Swedish Government has argued stubbornly that both Article 2.5 and 9.3 of the Aarhus Convention leave room for national criteria in deciding which organisations should be permitted to take legal action. However, from an Aarhus perspective it is made clear that such criteria must be arrived at with a degree of consideration for the objectives of the Convention, and should not mean that all organisations, or almost all of them, are excluded from access to justice.[89] On numeric limitation, it is perhaps worth mentioning that Sweden is the only country in Europe having such a criterion.[90] It is also interesting to note that many European countries, instead of pointing out the large scale and nationwide attendance among the NGOs, do quite the opposite. For them, local support and the "ad hoc" nature of the small organisations are key factors in allow-

[88] In the case of the wind park in Sjisjka (Governments decision 2007-12-19, dnr. M2007/1617/F/M), the County Board, the Environmental Agency and the Legal, Financial and Administrative Services Agency all opposed the project because of its effects on a nearby Natura 2000 site. However, none of these authorities was able to apply for judicial review.

[89] Decision II/2 (on Promoting Effective Access to Justice, ECE/MPP.PP/2005/6) on the second meeting of the parties to the Aarhus Convention in Almaty 2005. Advocate General Sharpston argues in the *DLV* case that the Member States do not enjoy any additional scope for manoeuvre when transposing the provisions of the EIA Directive in order to make it more difficult for NGOs to have access to administrative and judicial procedures. National criteria can only be employed as requirements for the existence of such bodies under national law (registration, constitution or recognition of associations) or in relation to the organisations' activities and how these are linked to the legitimate protection of environmental interests (62008C0263, para 72–73).

[90] See the above-mentioned study (footnote 61) initiated by the Commission on the implementation of Article 9.3 in the Member States.

ing the organisations to have a say in decision-making and in access to justice.[91] In our country, strict conditions have created a situation where only one or two NGOs have the authority to institute legal proceedings, while renowned organisations such as Greenpeace and the WWF remain excluded.[92] Accordingly, it came as no surprise when last summer the Supreme Court asked the ECJ for a preliminary ruling on the Aarhus provisions in the EIA Directive in the *DLV* case (C-263/08). The ECJ recently delivered its opinion, finding that the Directive precluded such a strict numeric criterion, as it deprived local associations of any judicial remedy.[93] This judgment means, first, that the criterion is no longer valid since the provision in the Directive without doubt has direct effect, and, second, that the legislature has to intervene. It is expected that the coming reforms will deal with both the numeric criterion and restrictions on what kinds of association will in future have access to justice.

4.7 The role of the Swedish courts

Finally, what is surprising in this context is the negative role played by the Swedish courts. One would have thought that such a closed system would have precipitated in judges the sense of "making right what ought to be right". In other countries, such as the UK, the courts have been at the forefront in facilitating access to justice for environmental NGOs.[94] No such perspective has been present in the Supreme Court[95] or the Supreme Administrative Court in Sweden. Not even the Environmental Court of Appeal, which in other issues has taken a distinctly environ-

[91] This is the situation in the other Nordic countries. In Finland, nationwide NGOs are allowed to appeal only on large-scale operations – for example, larger industries with discharges to the air that affect the whole country (see Kuusieniemi, K in *Access to justice in environmental matters in the EU*. (Ed. Ebbesson, Kluewer 2002), p. 177.

[92] Greenpeace has insufficient members (the organisation differs between "core members" and supporters) and the WWF is a foundation, which is an organisational form not covered by the provision.

[93] The case concerned a local NGO – Djurgården-Lilla Värtans miljöskyddsförening – having about 300 members.

[94] See Castle, P & Day, M & Hatton, C & Stokes, P: Environmental Justice. Report by The Environmental Justice Project. Environmental Law Foundation/Leigh Day & Co Solicitors/WWF-UK, 2004.

[95] The Supreme Court found in a decision that the word "permit" in Ch 16 sec. 13 of the Environmental Code did not comprise conditions in a permit (NJA 2004 p. 885).

mentally friendly position, has played a progressive role on this issue.[96] The only exception has been the Council of Legislation, dealing with legislative efforts to implement the Aarhus Convention.[97]

The Swedish position differs greatly from that in Finland, our neighbouring country with which we share administrative and legal traditions. The Finnish Supreme Administrative Court (HFD) has regarded itself as the ultimate defender of the primacy of EC law on green issues. With reference to the Finnish Constitution, where the protection of the environment is emphasised, and with reference to international development in the area (the Aarhus Convention), HFD has in two landmark cases expanded the right of NGOs to appeal in situations where no such right previously existed.[98] The most recent case dealt with a decision on hunting the wolf, a species protected by the Habitats Directive. Two regional environmental NGOs were granted leave to appeal, although the hunting legislation left no room for NGO access to justice. An important reason for the position of HFD was that someone has to be able to challenge decisions concerning the implementation of EC law.

5 Concluding remarks

5.1 Sweden goes West?

According to the administrative traditions in our country, neither individuals nor environmental NGOs are regarded as being affected by decisions on green issues and they cannot therefore appeal, because they have no standing. Under the influence of modern environmental law theory and the ratification of the Aarhus Convention, the legislature has to some extent adjusted to the more "Western" perspective, also confirming that environmental NGOs have a part to play in challenging decisions in certain areas. However, it might be worth drawing attention to the fact that in all of our neighbouring Nordic countries NGOs enjoy a much

[96] In fact, the ECoA has confirmed its very strict interpretation on NGOs standing in a couple of decisions over the last year, MÖD 2008-10-03 in cases M 7157-08 & M 7158-08, MÖD 2009:6 and MÖD 2009:11.

[97] The Council consists of members of the Supreme Court and the Supreme Administrative Court, appointed for a fixed period of time. It might be worth mentioning that one of three members of the Council who dealt with the Aarhus issues from the beginning was also chairman of the Swedish Tourist Association.

[98] HFD 2004:76 and HFD 2007:74.

broader access to justice, including cases concerning green issues. In Sweden, however, resistance from industry and landowning organisations has been unremitting and downright obstinate.[99]

One therefore cannot expect the legislature in our country to expand voluntarily the right of NGOs to challenge environmental decision-making. To my understanding, this must be achieved by pressure from the international community, not least the EU. However, the picture of access to justice in the Union is inconsistent. On the one hand, the official position is pro-environmental democracy and – as described above – a number of legislative acts have been introduced to implement the Convention, both at Community level and by Member States. On the other hand, there is hesitation among European countries to further these issues, especially when it comes to the third pillar.[100] At the EU level the Council – that is, the Governments of the Member States – has for many years blocked the proposal for a directive on access to justice. My understanding is that there are two explanations for this. First, leading countries such as Germany and UK are seen to be defending their own procedural autonomy and their understanding of the third pillar. In addition, the strong winds of "better regulations" have been blowing across Europe for some years. According to this philosophy, the procedures for environmental decision-making must become "simpler", which among other things brings about discussions on how to make it harder for the public concerned to protest and make appeals. Finally, one must not forget that the institutions of the Union are defending a long tradition of secrecy and non-transparency. Or as Krämer characterises the position within the bureaucracy of Brussels:[101]

[99] During the implementation of the ELD – which was extremely complicated to fit into the Environmental Code and which concerned vital questions for industry – a great deal of the industry's attention was concentrated on opposing increased possibilities for NGOs to have standing.

[100] In a sharply formulated letter 2008-04-08 to the Ministers of the Environment, shortly before the Riga meeting in 2008, John Hontelez, chairman of the European Environmental Bureau (an organisation for interaction of the European environmental NGOs), wrote that in some Member States, the Convention is considered to be "two pillars and a stick" (EEB 2008-04-08; Call for constructive decisions at the Third Meeting of Parties of the Aarhus Convention).

[101] Krämer, L: *EC Environmental Law*. Thomson (Sweet & Maxwell), 6th ed. 2007, p. 54.

> Community institutions, and in particular the Commission, start from the premise that the protection of the environment is the task of the public authorities – as if the (Community) administration were the owner of the environment: since the (Community) administration knows what is desirable to preserve, protect or improve the quality of the environment, an individual is, under this concept, rather perceived as a nuisance.

However, one must not become too discouraged. The urgent need to implement EC laws, the ECJ's strong position that Member States are required to offer legal protection where rights and obligations under environmental directives are breached,[102] in addition to the demands of the Aarhus Conventions, are all strong drivers for furthering environmental democracy in Europe. Furthermore, there is growing concern among the institutions of the Union that the demands of EC law must not only be implemented in the requested form, but also actually must be *enforced* in the 27 Member States. Given this, it cannot be too adventurous to guess that the ECJ in a near future confirms – at least step by step – that the public interest concerning green issues is to be represented by environmental NGOs. It is to be hoped that this article has made some modest contribution to an understanding of the urgent need for such a position to be realised.

[102] It is, however, noteworthy that the ECJ seems to apply a far less strict standard on acts and omissions of the Union itself. In the cases *Greenpeace* (C-321/95 P), *Paraquat* (T-94/04), *Região autónoma dos Açores* (T-37/04) and, most recent, WWF-UK (C-355/08 P), the court has been applying an extremely traditional perspective on the right of entities outside the EU institutions (NGOs, regions) to have a say in environmental decision-making. Comparing these cases with those of Member States' obligations, Jans & Vedder mean that in fact the ECJ is applying a double standard and that "the legal protection against European decisions having significant environmental effect is seriously flawed" (Jans & Vedder p. 214).

Bradley C. Karkkainen

Endangered Species Protection in the United States: From Prohibition to Proactive Management

1 Introduction

The Endangered Species Act (ESA),[1] enacted in 1973, was among the first statutes in the world to broadly prohibit the killing or harming of species listed as "endangered" or "threatened," and it remains arguably the strongest such legislation ever enacted.[2] The ESA is strikingly sweeping in scope, biocentric in orientation, and absolute in character. It requires the listing of virtually any plant or animal species in danger of extinction, however trivial its apparent economic, aesthetic, or other value to humans.[3] With limited exceptions, it flatly prohibits the killing or harming of any member of a listed animal species, without regard to economic costs or other anthropocentric considerations.[4]

[1] Endangered Species Act of 1973 (ESA), Pub. L. 93–205, as amended, codified at 7 U.S.C. § 135, 16 U.S.C. §§ 1531 et seq.

[2] Holly Doremus, Comment, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 Ecology L.Q. 265 (1991) (characterizing the Endangered Species Act as "the strongest legislation ever devised for the protection of non-human species").

[3] ESA § 4 (a) & (b), 16 U.S.C. § 1533 (a) & (b) (requiring the listing of "endangered" and "threatened" species "solely on the basis of the best scientific and commercial data available").

[4] ESA § 9 (a)(1)(B) & (C), 16 U.S.C. § 1538(a)(1)(B) & (C) (prohibiting the "take" of any listed endangered species of fish or wildlife); ESA § 3(19), 16 U.S.C. § 1533(19) (defining "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, to to attempt to engage in any such conduct").

But the statute's commands, while sweeping, are almost entirely negative in character. Although the ESA prohibits actions that "harm" listed fish and wildlife species, it does not require affirmative conservation measures to assist struggling species. Nor does it require preventive measures to keep species from becoming endangered in the first place. In light of its emphasis on essentially negative proscriptions of behavior—commands of the "Thou shalt not" type—one prominent commentator has aptly characterized the ESA as a "prohibitive policy."[5]

The last decades have seen a gradual reorientation of endangered species policy away from enforcement of the ESA's prohibitory provisions, and toward a more proactive managerial approach. This approach aims to go beyond prohibitions on harm to listed species by promoting affirmative, forward-looking conservation measures that might benefit not only the listed species themselves but also the broader biotic communities, habitats, and ecosystems of which they are a part. A crucial enabler of this shift is a previously obscure waiver provision, section 10(a) of the statute, which authorizes federal authorities to permit limited "take" (or harm) of a listed species if accompanied by an approved Habitat Conservation Plan, provided the authorities find that the "take" will be "incidental" and will not substantially impair the species' prospects of survival and recovery.[6]

This paper argues that the expanded use of Habitat Conservation Plans in the context of endangered species policy is emblematic of a broader shift now taking place in U.S. environmental law and policy, away from detailed "primary rules" (in H.L.A. Hart's term) directly proscribing behaviors thought to be environmentally harmful, toward more flexible managerial approaches employing a mix of procedural ("secondary") rules, more general substantive standards, the expanded use of incentives to promote affirmative conservation-enhancing behaviors, and integrated "adaptive management" approaches.

[5] Stephen L. Yaffee, Prohibitive Policy: Implementing the Federal Endangered Species Act (1982).

[6] Endangered Species Act § 10(a), 16 U.S.C. § 1539(a) (authorizing the issuance of permits for the "taking" of listed species if the taking "is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," provided that the taking "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.") The permit applicant must also submit and secure government approval for a Habitat Conservation Plan designed to "minimize and mitigate" harm to the listed species. *Ibid* § 1539(a)(2)(A).

2 Endangered Species Act: The Basics

Unlike other federal environmental statutes like the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Endangered Species Act is a fairly simple statute.

Section 4 of the statute requires the Secretary of the Interior, as titular head of the Fish and Wildlife Service (FWS), to issue regulations listing species as "endangered" or "threatened"[7] if, solely on the basis of the "best scientific and commercial data available,"[8] the Secretary determines that the species is "in danger of extinction throughout all or a significant portion of its range" ("endangered"),[9] or is "likely to become an endangered species within the foreseeable future" ("threatened").[10] For marine, anadromous, and catadromous species, the listing determination is to be made by the Secretary of Commerce as titular head of the National Marine Fisheries Service.

Section 4 also authorizes citizens to petition for listing determinations, and generally requires the Secretary to respond to such petitions within twelve months, either by listing the species, declining to list, or explaining why listing is precluded or unnecessary under one of several narrow exceptions specified in the statute.[11]

Concurrently with the listing determination, the Secretary must also designate "critical habitat" for the listed species[12]—that is, habitat occupied by the species and containing "those physical or biological features essential to the conservation of the species," as well as such additional lands as the Secretary determines are "essential for the conservation of the species."[13] Finally, the Secretary is also required to develop "recovery

[7] ESA § 4(a) (mandating that the Secretary "shall by regulation … determine whether any species is an endangered species or a threatened species").

[8] ESA § 4(b)(1)(a), 16 U.S.C. § 1533(b)(1)(a) (setting out the "basis for (listing) determinations").

[9] ESA § 3(6) (defining "endangered species").

[10] ESA § 3(20) (defining "threatened species").

[11] ESA § 4(b)(3)(A) & (B).

[12] ESA § 4(a)(3) (mandating designation of critical habitat "concurrently with making a (listing) determination").

[13] ESA § 3(5)(A) (defining "critical habitat").

plans" for listed species,[14] although these recovery plans have no binding legal effect and no deadline is specified for their promulgation.

Much of the work of the Endangered Species Program of the Fish and Wildlife Service goes into Endangered Species Act listing determinations, critical habitat designations, and development of recovery plans. And since all these federal actions, as well as the agency's failure to take a required action, are subject to judicial review under the Administrative Procedure Act[15] and/or the Endangered Species Act's citizen suit provision,[16] they have been the subject of much litigation,[17] typically brought by environmental organizations seeking to compel additional species listings, more expansive or timelier critical habitat designations, or the issuance of recovery plans. These lawsuits and the court orders that sometimes follow often force the agency to expend even more resources on listing, critical habitat designation, and recovery plan development[18]—much to the consternation of current and former Interior Department

[14] ESA § 4(f) (requiring the Secretary to "develop and implement plans … for the conservation and survival of endangered species and threatened species … unless he finds that such a plan will not promote the conservation of the species").

[15] Because the Endangered Species Act contains no statutory review provision, judicial review may be had under the Administrative Procedure Act, which authorizes any person "adversely affected" by a "final agency action" alleged to be unconstitutional, ultra vires, "arbitrary and capricious," or "otherwise not in accordance with law" to seek judicial review of the allegedly wrongful action. Administrative Procedure Act, 5 U.S.C. Chapter 7, §§702, 706. The U.S. Supreme Court has held that judicial review under the APA is not precluded by the Endangered Species Act's citizen suit provision, see infra, although there is potentially some overlap between the two causes of action. *See* Bennett v. Spear, 520 U.S. 154, 175 (1997) ("No one contends (and it could not be maintained) that the causes of action against the Secretary set forth in the ESA's citizen suit provision are exclusive, supplanting those provided by the APA.").

[16] ESA § 11(f) (authorizing citizen suits to enjoin violations of the statute or its implementing regulations, or "against the Secretary where there is alleged a failure of the Secretary to perform any act or duty … which is not discretionary").

[17] As of 5 September 2008, the Westlaw Federal Courts Database listed 2140 cases citing the Endangered Species Act. While not all of these are ESA judicial review or citizen suit cases, many are.

[18] *See, e.g.*, Center for Biological Diversity v. Norton, 163 F. Supp. 2d 1297, 1299–1300 (D.N.M. 2001) (ordering FWS to complete a 12-month finding on a petition to list the Sacramento Mountains checkerspot butterfly as an endangered species with critical habitat, and holding that the agency's budgetary crisis, allegedly caused by other judicially-imposed listing and critical habitat deadlines, does not excuse its obligation to meet statutory deadlines).

officials who complain that their time and scarce agency resources could be better spent on species recovery.[19]

Although the listing, critical habitat, and recovery plan determinations absorb a great deal of agency time, attention, and resources, it is the principal operative provisions, Sections 7 and 9, that have the greatest substantive effect.

Section 7, the so-called "consultation requirement," prohibits federal agencies from taking any action—including funding or permitting non-federal projects—that would "jeopardize" the continued existence of listed endangered or threatened species of plants or animals.[20] It further requires that agencies consult with the Fish and Wildlife Service (or National Marine Fisheries Service) in the course of making this determination, and in finding "reasonable and prudent alternatives" to any action that would result in "jeopardy."[21]

Section 9 prohibits trafficking in and "taking" of fish and wildlife species listed as endangered.[22] The statute defines "take" to include "harm,"[23] and by regulation, "harm" includes adverse habitat modification that "actually kills or injures wildlife" by impairing essential func-

[19] *See* Jason M. Patlis, *Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts*, 16 Tul. Envtl. L.J. 257, 311–12 (2003) (stating that FWS has long resisted spending money on critical habitat designations because it believes they provide little protection to listed species, but as of July 2002 it was faced with a backlog of 250 species listing proposals, 420 court-ordered critical habitat designations, and reevaluation of 180 "not prudent" findings relating to critical habitat, with 30 to 40 new listing petitions coming in annually).

[20] ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) (requiring federal agencies to "insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of [designated critical] habitat").

[21] Consultation is required, inter alia, in determining whether there is likely to be "jeopardy" to a listed species or adverse modification of its critical habitat, 16 U.S.C. § 1536(a)(2) & (a)(4). The Services are required to issue a so-called "biological opinion" which "detail[s] how the agency action affects the species or its critical habitat" and sets out "reasonable and prudent alternatives" which would avoid "jeopardy" and adverse modification of critical habitat. 16 U.S.C. § 1536(b).

[22] ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1) (prohibiting the import, export, possession, sale, delivery, transport, shipping, and "take" of fish or wildlife species listed as endangered).

[23] ESA 3(19), 16 U.S.C. 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect … .").

tions such as breeding, feeding, and nesting.[24] Unlike section 7 which applies only to federal agencies in the first instance, section 9 applies to "any person,"[25] and thus its prohibitions directly reach the actions of private parties, including private landowners who may be prohibited from engaging in land uses that adversely modify endangered species habitat. It should also be noted that while on its face section 9 applies only to species listed as "endangered," the Secretaries of Interior and Commerce have promulgated regulations extending the "take" prohibition to species listed as "threatened." By its terms, however, section 9 protects only fish and wildlife species, not plants;[26] there is no direct federal prohibition on harm to listed plant species, except on federal land or by the action of federal agencies.

Both provisions are framed in simple, absolute, prohibitory terms, and in the colorful phrase of some commentators, both have proven they can be "pit bulls" in practice: once their powerful legal jaws lock on a target, their grip is tenacious, bone-crushing, and extremely difficult to shake.[27]

Section 7 showed its muscularity early on, in the now famous case of *TVA v. Hill*.[28] In that case, environmentalists, recreational users, and local farmers had opposed construction of a government-sponsored dam on a wild and scenic stretch of the Little Tennessee River in eastern Tennessee, one of the last free-flowing streams in an area studded with hydroelectric dams built to bring electricity to a poverty-stricken rural region. Through litigation under the National Environmental Policy Act,[29] dam opponents managed to halt the project for a time to require the Tennes-

[24] 50 C.F.R. § 17.3 provides as follows: "*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."

[25] 16 U.S.C. 1538(a)(1) ("[I]t is unlawful for *any person* to … .") (emphasis added).

[26] See *ibid* ("… with respect to any endangered species of fish or wildlife … .").

[27] The analogy of the ESA to a pit bull has become commonplace in the U.S. environmental law literature, but it is widely attributed to former Assistant Secretary of the Interior Don Barry. *See, e.g.*, Madeline June Kass, *A Least Bad Approach for Interpreting ESA Stealth Provision*s, 32 Wm. & Mary Envtl. L. & Pol'y Rev. 427, 449 & n.128 (2008).

[28] TVA v. Hill, 437 U.S. 153 (1978).

[29] National Environmental Policy Act of 1969, codified at 42 U.S.C. 4321 et seq. Section 102(2)(c) of that statute requires federal agencies to provide a "detailed statement" of the environmental impacts of, and alternatives to, any "major federal action" that "significantly affects the quality of the human environment."

see Valley Authority (TVA), the project's sponsor, to complete a required Environmental Impact Statement.[30] In the interim, however, a biologist at the nearby University of Tennessee discovered a previously unknown species of fish, the snail darter, which apparently used this reach of the Little Tennessee River as its only habitat.[31]

As fish go, the snail darter was unremarkable: about three inches long and tannish in color; lacking any commercial, aesthetic, or sport-fishing value; to the naked eye hardly distinguishable from some 130 other species of darter, including as many as 90 distinct darter species found in the state of Tennessee, of which at least 45 occupy portions of the Tennessee River system.[32]

But the (then) newly enacted Endangered Species Act gave the snail darter a rather remarkable legal stature. Opponents of the Tellico Dam petitioned the Secretary of the Interior to list the snail darter as an endangered species. After determining that the fish's only known habitat was the stretch of the Little Tennessee River that would be completely inundated by the dam's reservoir whose warm, slack water would be unsuitable for the snail darter which required cooler, free-flowing water, the Secretary listed the species as endangered and designated the relevant stretch of the Little Tennessee River as its critical habitat.

At that point, dam opponents filed a new lawsuit, contending that completion of the dam would "jeopardize the continued existence" of a listed endangered species, contrary to the prohibitions contained in ESA section 7(a). The trial court agreed with the plaintiffs' factual claims, but exercised its equitable discretion to deny them injunctive relief, stating that it would be "absurd" to order the cancellation of a $78 million project that was already 80 % complete by the time the suit was filed, and that was started before the Endangered Species Act was even enacted.[33]

The Court of Appeals accepted the trial court's factual findings but reversed its denial of an injunction, holding that in such a case of a clear violation of the statute, an injunction was the only suitable remedy. The Supreme Court affirmed. While its rhetoric suggests the Court was not

[30] *See* Environmental Defense Fund v. TVA, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972) (enjoining completion of the Tellico Dam until the required environmental impact statement is produced).

[31] *See* TVA v. Hill, 437 U.S. at 159–60.

[32] *See ibid*.

[33] *Ibid* at 166–67.

entirely happy with the result,[34] the Court held that the statute was clear on its face,[35] and that it meant what it said and said what it meant: federal agencies are prohibited from taking any action that will jeopardize the continued existence of a listed species, even if that action began before the statute's enactment, is substantially completed, and has been the subject of repeated Congressional authorizations and appropriations of funds.

Since *TVA v. Hill*, Section 7 has been invoked literally hundreds of times, compelling federal agencies to consult with FWS and NMFS to determine whether their projects or programs implicate endangered species, whether there is potential jeopardy, and what "reasonable and prudent alternatives" might be available. While this process has resulted in the cancellation or termination of only a small handful of federal projects, it has resulted in the modification of a great many, either to secure conformity with "reasonable and prudent alternatives" recommended by FWS or NMFS, or further back in earlier stages of project planning as agencies seek to tailor their efforts to preclude the necessity for formal section 7 consultation[36] or to minimize the possibility of a "jeopardy" determination if formal consultation is required.[37] While these effects are difficult, if not impossible, to quantify, there can be little doubt that the ESA section 7 substantive prohibition on "jeopardy" and its accompanying consultation procedures, coupled with the threat of judicial review, citizen suit enforcement, and the transparency afforded by NEPA's information disclosure requirements, have operated as a powerful constraint on federal agency actions.

Ironically, although the section 9 "take" prohibition—applying to "any person" and prohibiting any "harm" to individuals of a species, even short of "jeopardy" to the continued existence of the species as a whole—

[34] *See ibid* at 172–73 (describing the result as "curious" and a "paradox").

[35] *Ibid* at 173 ("One would be hard pressed to find a statutory provisions whose terms were any plainer than § 7 … .").

[36] FWS has stated that it prefers to resolve ESA section 7 issues through "informal consultation" with project agencies wherever possible, and in addition it issues "counterpart regulations" categorically exempting large tranches of low-impact federal actions from the section 7 consultation requirement. *See* Jamison Colburn, *The Indignity of Federal Wildlife Habitat Law*, 57 Ala. L. Rev. 417, 450–51 (2005).

[37] By some estimates, as few as 0.3 % of all formal and informal section 7 consultations result in "jeopardy" determinations. *See* Jamie Grodsky, *The Paradox of (Eco)Pragmatism*, 87 Minn. L. Rev. 1037, 1044 n.26 (2003) and sources cited therein.

is in important ways much broader in scope than section 7, its effects are probably less widely felt. Federal activities are addressed primarily through section 7. Non-federal (state and local) government activities as well as actions by private parties are subject to the section 9 "take" prohibition,[38] but FWS and NMFS have no systematic way of monitoring or inspecting activities on non-federal lands that might implicate listed species or their habitat; nor, for their part, are non-federal parties required to consult with FWS or NMFS for purposes of determining whether section 9 is implicated. Consequently, it is widely believed that most violations of section 9 go unreported, undetected, and unenforced,[39] and in many cases the violators may not even be aware that they are violating the Act. Nor has there been much citizen suit litigation to enforce section 9 against private parties, again likely due to the difficulty of detecting and proving violations occurring on lands to which private plaintiffs have no right of access.

Where section 9 conflicts do arise, however, is in the context of proposed changes in land use, which typically require regulatory and permitting approvals by local, and sometimes regional and state, government agencies. Typically these approvals require public hearings, and in many states they may require environmental impact assessments under state "little NEPA" statutes. These procedures, in turn, may trigger scrutiny and input by conservation and environmental organizations as well as state environmental and natural resources officials. It is in this context that the possible presence of, and harm to, endangered species and their habitat may be invoked.

At least at the outset, federal FWS and NMFS officials are likely to be somewhat passive participants in these processes, brought in to consult on possible endangered species impacts. But as controversies develop, federal officials have been known to take a more active role, sometimes to the point of threatening section 9 enforcement if state and local officials

[38] *See* ESA § 3(13), 16 U.S.D. 1532(13) (defining the term "person" (as it appears in 9) to include an individual, corporation partnership; federal, state, or local government; or any officer, employee, agent, department, or instrumentality of any government).

[39] *See, e.g.*, Reed D. Benson, *Dams, Duties, and Discretion: Bureau of Reclamation Water Project Operations and the Endangered Species Act*, 33 Colum. J. Envtl. L. 1, 52 & n.292 (2008). An exception is border enforcement of the section 9 prohibitions on the import, export, transportation, and sale of listed species and their parts and derivatives, provisions that implement U.S. obligations under the Convention on International Trade in Endangered species (CITES).

issue regulatory approvals for land use changes that would result in substantial harm to endangered species habitat.

Although such controversies are rare, they are almost always heated when they do occur. Landowners subject to section 9 almost invariably feel that they are being horribly mistreated, their rights as landowners trampled by a rigid, overreaching federal statute that places the interests of obscure species of birds, rodents, even insects above their own palpable human interests in making a living from their land—in the colorful words of Justice Scalia, finding their land "conscripted to national zoological use."[40] Worse, perhaps, from the landowners' perspective, the section 9 "take" prohibition appears to be absolute: if it applies, it applies with full force, no room for compromise, trade-offs, cost-benefit balancing, or reasonableness constraints.

And worst of all, perhaps, it appears quite arbitrary. Other landowners proposing similar land use changes on lands on which, by chance, endangered species are not found, face no limitations whatsoever. Other landowners who changed land uses and destroyed or modified habitat for the very same species at an earlier date, before the species was listed as threatened or endangered, are home free. Other landowners engaging in similar land use changes on habitat for species not yet listed are also subject to no restrictions, even if their habitat-destroying land use changes may lead to the species' eventual listing. Small wonder, then, that affected landowners often feel they are being unfairly singled out. Small wonder that, although section 9 is rarely enforced, its enforcement is met with howls of protest.

Small wonder, too, that while the Endangered Species Act is arguably the most beloved of all the federal environmental statutes among environmentalists of a certain stripe because of its singularly, ruthlessly, and uncompromisingly biocentric approach, it is simultaneously perhaps the most reviled and resented of all the federal environmental statutes among landowners of another stripe—again, for what they perceive to be its biocentrism (and concomitant lack of concern for humans impacts), its rigidity, its seeming obtuseness to trade-offs and cost-benefit balancing. In short, many landowners resent it for the very qualities that endear it to environmentalists.

[40] Babbit v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting).

3 From Prohibition to Proactive Management

There is some evidence that the Congress that enacted the Endangered Species Act in 1973 had no idea it was enacting such a far-reaching and powerful piece of legislation. Its predecessor statutes—the Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969—merely provided for listing of endangered species and authorized federal land acquisition for their protection.[41] Although there was a great deal of support in 1973 for strengthening these statutes in light of the widely publicized plight of such iconic (and charismatic) species as the sperm whale, bald eagle, brown pelican, peregrine falcon, American alligator, gray wolf, and grizzly bear, few people imagined that the original list of 109 species would swell to over 1 900 today.[42] Nor, apparently, did many of the new statute's congressional supporters understand that the seemingly innocuous section 7 "consultation requirement" or the equally harmless-sounding section 9 prohibition on "take" would have such sweeping substantive effects.[43] The statute passed almost unanimously and with very little debate as to its substantive provisions.[44]

Only after its enactment did its scope and meaning become apparent. It has remained highly controversial since the *TVA v. Hill* case first thrust it onto the national stage.

Yet while the Endangered Species Act looks tough and can bite hard, it bites only infrequently. The Fish and Wildlife Service and National Marine Fisheries Service are populated largely by biologists, not law enforcement officers. These agencies do not have do not have the history or culture of tough law enforcement agencies, and they tend to be fairly weak politically, without a large popular constituency or powerful champions in Congress. Consequently, they are disinclined to foment controversy. Critics charge that the statute has been underenforced from the outset, and systematic underenforcement arguably only exacerbates the sense of arbitrariness experienced by the relatively small number of landowners who do come under its grip.

[41] *See* Kass, *op. cit. supra* note 27, at 447–48.

[42] *See* Kass, *op. cit. supra* note 27, at 450 & n.134 (citing statement by a prominent member of Congress that "[We] envisioned trying to protect … pigeons and things like that. We never thought about mussels and ferns and flowers and all these subspecies of squirrels and birds").

[43] *See* Kass, *op. cit. supra* note 27, at 450–51.

[44] *Ibid.*

Political pressure has been building for some time to "reform" the Endangered Species Act, although there is little consensus in Congress as to exactly what such reforms should look like. Landowner-oriented interests argue for trimming the scope of the statute and softening its impact on landowners. Many environmentalists argue for maintaining the statute as is but strengthening its enforcement.

Yet for some time there has been a third pole in this policy debate, one that rarely receives much popular media coverage in the pitched battle between landowners and environmentalists. Many scientists and other environmental policy experts have argued that the essentially negative prohibitions of the statute—establishing a "do no harm" standard with respect to listed endangered and threatened species—falls well short of an enlightened policy on species and habitat protection. They emphasize several factors.

First, the Endangered Species Act does nothing for any species until it is so diminished in numbers that it is literally in danger of extinction. Just as with human health care, relying exclusively on this kind of last-ditch "emergency room care" can be much more costly and much more dangerous than earlier routine interventions and preventive maintenance. By the time the ESA kicks in, they argue, the remaining conservation options may be relatively few in number, costly, and risky.

Second, and related to the first, the ESA is based on a policy of what economists call "discontinuous pricing"—but in this case, the discontinuity is extreme. In effect, the ESA places no value at all on species or their habitats until there are just a few left, and at that point they are treated as having virtually infinite value under the seemingly absolute commands of the statute, which (as we saw above) admit of no trade-offs or cost-benefit calculations. Not only does this strike many landowners as irrational and arbitrary, but arguably at the margins it may create a perverse incentive to make sure that you convert habitat early, *before* the species associated with it are listed as endangered, because there is no cost or consequence to doing so. Latecomers to the habitat conversion process will be penalized, potentially very heavily.

Third, the emphasis in the ESA is on species-by-species protection. It protects habitats—and by implication, the larger biotic communities that occupy those habitats—only indirectly and as a means to species protection, and again, only late in the day, typically after most of the habitat has been destroyed or degraded. It pays no attention whatsoever to larger landscape-scale conservation that might provide "umbrella" protection

to larger suites of species, both those currently endangered or threatened and those that are not yet so imperiled.

Fourth, even with respect to the species it seeks to protect, the ESA is essentially a "hands-off," "do-no-harm" measure. It neither requires nor does anything to encourage affirmative conservation measures that might actually benefit listed species or their habitats, such as restoration of degraded habitats by removing invasive plant species and replanting of native species. Indeed, and again at the margins, it may actually create disincentives for landowners to restore endangered habitat types (like tallgrass prairies here in the upper Midwest), because to do so might invite some endangered species to find its way there and thereby limit the landowner's future options. But often the "do-no-harm" standard may be of less benefit to a species than even a relatively modest and less costly affirmative conservation measure. To that extent, the ESA may provide suboptimal and inefficient benefits to the very species it is trying to protect.

These criticisms are not new. Many of them have been in circulation for the better part of three decades, almost since the ESA's enactment. And at one point, Congress did take at least one of these criticisms—the "do-no-harm" versus "affirmative benefits" critique—into account.

In 1980, the ESA was amended to add a seemingly modest waiver provision, section 10(a), which authorizes the Secretary of Interior (or Commerce) to approve the "taking" of listed species under carefully controlled circumstances. The Secretary may issue an "incidental take permit" if 1) the taking is incidental to, and not the purpose of, an otherwise lawful activity, 2) the applicant demonstrates that the taking will not appreciably reduce the species' prospects of survival and recovery in the wild, and 3) the application is accompanied by, and the Secretary approves, a Habitat Conservation Plan designed to minimize and mitigate harm to the listed species.[45]

The Incidental Take/Habitat Conservation Plan provision was added to the statute to accommodate a compromise proposed in connection with the Mission Blue butterfly and several other species resident in a large (3,400 acre) tract of undeveloped land on San Bruno Mountain, south of San Francisco, one of the largest open spaces left on the San Francisco Peninsula. The landowners wished to develop the area for residential and commercial purposes. Local conservation groups objected,

[45] ESA § 10(a), 16 U.S.C. § 1539(a).

citing the effects on the Mission blue butterfly and other endangered species, and the Fish and Wildlife Service opined that there would, indeed, be "harm" and therefore a "taking" of these listed species if the development went forward as planned. At that point, the landowner/developer, working in collaboration with state and local officials, other local landowners, and conservations groups, came forward with a revised proposal. The developers would scale back their proposed development to about 14 % of the tract in question, and in exchange for the necessary development approvals would convey a portion of the remaining land to the county and dedicate the rest to privately owned open space use for preservation as butterfly habitat. In addition, the developer would undertake a habitat restoration program, removing invasive plant species, replanting with native plants and shrubs on which the Mission Blue depended for feeding, breeding, and sheltering, and paying for periodic prescribed burns, replicating the naturally occurring fire regime that suppressed invasive plants and promoted regeneration of native plants adapted to periodic low-intensity fires.[46]

In short, the developer proposed what appeared to be a sensible tradeoff: modest reductions in the quantity of habitat, in exchange for qualitative improvements to the remaining habitat that, according to most experts, would more than offset the small reduction in habitat size, producing a net benefit to the species in question.

FWS was intrigued by the proposal, but it found it had no statutory authority to derogate from the absolute "no take" prohibition of section 9. Thereupon members of the California congressional delegation prevailed upon Congress to amend the statute to allow the San Bruno Mountain compromise, and others like it, to go forward.[47]

The legislative history clearly indicates that Congress intended section 10(a) Incidental Take permits to be issued only in genuine "win-win" situations—that is, where (as in San Bruno Mountain) both the landowner and the protected species would be better off by authorizing a limited take coupled with affirmative habitat conservation measures, than they would be under strict application of the prohibitory "no take" rule alone.

[46] *See generally* Friends of Endangered Species v. Jantzen, 760 F.2d 976 (9th Cir. 1985) (recounting the San Bruno Mountain story and rejecting challenges to the issuance of an Incidental Take Permit).

[47] *See* Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. Envtl. L.J. 279, 297–99 (1998).

For more than a decade after its enactment, however, section 10(a) was rarely invoked, as only fourteen HCPs were approved between 1982 and 1992.[48] Several factors were at play. First, habitat conservation planning can be a costly exercise, and many landowners, especially those with relatively small tracts of land, found the exercise simply not worth the cost.[49] Second, in many cases the science of conservation planning is highly uncertain. This in turn means that the prospects of developing a defensible plan and securing its approval are also highly uncertain, especially insofar as uncertain science is an open invitation to public controversy.[50] Third, approval of an Incidental Take Permit under section 10(a) is not "as of right." Instead, the statute gives the Secretary broad discretionary authority to reject or demand modifications in even the most defensible plan,[51] adding to the landowner/developer's regulatory uncertainty. Fourth, and perhaps most crucially, the FWS' limited enforcement capacity probably meant that most development plans moved forward quietly without Incidental Take Permits, and without real fear of FWS scrutiny and enforcement.[52]

All that changed, however, when Bruce Babbitt became Secretary of the Interior under President Bill Clinton in 1992. Babbitt was eager to find a way to avoid what he colorfully terms Endangered Species Act "train wrecks"—head-on collisions between landowners and environmentalists over species protection on private lands. He and his staff were also eager to move beyond the narrow, reactive, species-specific focus of the ESA, and toward larger, landscape-scale, proactive habitat conservation planning.

Babbitt's strategy was two-fold: first, ramp up ESA section 9 enforcement, to get landowners' attention. And second, ramp up the use of

[48] Sheldon, *op. cit. supra* note 47, at 299–300.

[49] *Ibid* at 301.

[50] *Ibid* at 302.

[51] The language authorizing the issuance of Incidental Take Permits is framed in broadly permissive and discretionary, not mandatory terms, *See* ESA § 10(a)(1), 16 U.S.C. 1539(a)(1) ("The Secretary *may* issue, *under such terms and conditions as he shall prescribe … .* ") (emphasis added). As if to underscore the point, the provision specifically authorizes the Secretary to impose additional "terms and conditions" at his discretion. *See ibid* § 10(a)92)(B) ("The permit shall contain *such terms and conditions as the Secretary deems necessary or appropriate* to carry out the purposes of this paragraph … .") (emphasis added).

[52] Michael J. Bean et al., Reconciling Conflicts under the Endangered Species Act: The Habitat Conservation Planning Experience 41 (1991).

section 10(a) Habitat Conservation Plans, using the threat of section 9 enforcement to bring reluctant landowners to the bargaining table where FWS officials could press for forward-looking conservation plans that could potentially benefit multiple species.

Babbitt's greatest opportunity came in southern California, where development pressure in suburban San Diego, Orange, and Riverside Counties was chewing up vast tracts of the California Coastal Sage Scrub habitat on which many endemic species depend. Seeking to avoid additional ESA listings, California had recently enacted a Natural Communities Conservation Planning (NCCP) Act, seeking to empower broad "stakeholder" committees of state and local officials, conservationists, landowners, and developers to engage in regional-scale conservation planning. But in the absence of a legal "stick," the NCCP process was faltering in most parts of the state.

Babbitt seized a strategic opportunity to inject new life into the NCCP process. Listing the California gnatcatcher, a small songbird, as "threatened" under the ESA, would threat to bring development in the Coastal Sage Scrub lands to a screeching halt—or at a minimum, throw a great deal of uncertainty into the development process. Under this background threat—what I have dubbed elsewhere a "penalty default" regulatory option—the parties in San Diego, Orange, and Riverside Counties began to negotiate in earnest, eventually hammering out sweeping, landscape-scale habitat conservation plans that dedicated large tracts to permanent use as core habitat reserves, and limited development in areas adjacent to the core reserves to those uses most compatible with habitat protection. These habitat plans, which benefit not only the California gnatcatcher but an entire suite of species dependent on the Coastal Sage Scrub, were incorporated into municipal and county-level land use plans and zoning ordinances, where they became legally enforceable as part of the land development process. In exchange, Secretary Babbitt exercised his discretionary statutory authority under section 4(d) of the ESA[53] to exempt the California gnatcatcher from the blanket "no-take" prohibition of section 9, and put in place a series of special 4(d) rules authoriz-

[53] ESA § 4(d), 16 U.S.C. § 1533(d) (authorizing the Secretary to "issue such regulations as he deems necessary and advisable to provide for the conservation of" any species listed as "threatened" under the ESA. Arguably, then, listing the gnatcatcher as "threatened" rather than "endangered" expanded the range of the Secretary's discretion.

ing incidental "take" of the gnatcatcher insofar as it is incident to development authorized under land use laws implementing the Coastal Sage Scrub NCCP plans.

The Southern California NCCP plans also included several additional novelties. First, they required developers to pay into a fund to support ongoing monitoring and management of the habitat reserves. Second, they provided for a limited form of "adaptive management," allowing species conservation and mitigation measures to be adjusted (within bounds) as conditions on the ground changed, and as scientists learned more about the protected species and their habitat. In short, the Southern California NCCP plans represented the transformation of the ESA from a narrowly prohibitory, species-specific, and parcel-specific statute, to a broadly proactive affirmative conservation planning and management program, operating at landscape scales and emphasizing multiple-species, habitat-oriented interventions.

Would that I could end this tale on that happy note. But the intervening years have not been kind to the Endangered Species Act, nor to the Habitat Conservation Planning Program. I will not recount all the reasons here for this recent "Little Dark Age" in species protection. Suffice it to say that the downside of a conservation planning and management approach, which inevitably requires a good deal of agency discretion, is that the discretion can be, and sometimes is, abused by those who do not share the conservation goals set forth in the statute. Strict rule-bound approaches may (arguably) be somewhat easier for NGOs and interested citizens to police—though the sad history of ESA underenforcement through the years might caution otherwise.

But at the end of the day, this may simply be a trade-off we need to accept. Narrow rule enforcement will simply not give us the kind of broad, affirmative, proactive, adaptive, multi-species conservation measures we so desperately need. That is a lesson we are also learning in other areas of environmental law, such as water quality and watershed protection where we have strictly enforced pollution-control rules against big municipal and industrial polluters for years, but now find that the biggest culprits are our own lawns, gardens, roadways, farms, and automobiles emitting airborne pollutants that settle eventually in the nation's waters, as well as smokestacks as far away as Asia emitting toxic heavy metals like mercury that end up in our water here in Minnesota—requiring a rethinking of our basic approach, toward broadly integrative and adaptive management at vastly larger landscape scales.

Ultimately, then, as we emerge from this "Little Dark Age" in environmental law, we may be seeing the beginnings of a convergence, as we begin finally to appreciate the interconnectedness of these fragile webs of life, and the need for affirmative and adaptive approaches to allow us to learn as we go.

More broadly, the shift from narrow prohibitory rule-enforcement to affirmative and proactive management in the ESA context is consistent with a number of other broad shifts in environmental law in the United States. Although the connections may not seem apparent at first, a family of environmental law "reforms" that have emerged in the last two decades have attempted to lighten the hand of enforcement in favor of an expanded zone of monitored self-regulation. These include the emergence of market-based incentive approaches, "self-policing" through EPA's enforcement penalty structure (which rewards regulated parties for self-identifying, self-reporting, and self-correcting problems), measures to encourage the adoption of corporate and governmental Environmental Management Systems, negotiated rulemaking in facility-, firm-, or industry-specific contexts, as well as expended reliance on information disclosure as a kind of quasi-regulatory measure that harnesses a host of market and social pressures for industries to seek voluntarily to improve their own environmental performance. The goal of these measures, I take it, in not simply to lighten the hand of regulation for its own sake—though that may be a welcome element from the regulated industry's perspective. Instead, the core notion is that while the negative incentives imposed by harsh punitive rules may be effective up to a point, they create no dynamic incentive for parties to take affirmative measures to improve their own environmental performance. That, I take it, is also the core lesson of the Endangered Species Act story recounted here.

Petter Asp and Iain Cameron

Terrorism and Legal Security – a Swedish and European perspective

Abstract: In this paper we discuss the influence the struggle against terrorism has had on criminal law and public international law during the last decade. The paper begins with a very brief historical overview and a discussion concerning the definition of terrorism. The question of how terrorism is to be defined has – not least in Swedish perspective – been controversial. Thereafter we examine how terrorism has influenced developments in the two subjects. The following issues in particular are taken up:

– international law concepts are now being increasingly used in a criminal law context, which can create problems, at least for states which take international law seriously,

– terrorism has led to new types of sanctions which do not build in traditional guarantees for legal security (Rechtssicherheit), such as freezing of financial assets which in principle are put into operation on the basis simply of suspicion,

– terrorism is one of the most important causes of the trend towards bringing forward the point in time when an offence is regarding as having started (illustrated inter alia by EU and Council of Europe conventions),

– terrorism is used to justify new and powerful types of coercive investigative measures e.g. as regards preventive (proactive) use of surveillance, and strategic surveillance.

Generally one can say that the importance attached to preventing terrorist crime has heavily influenced the legislator. The Swedish legislator has shown a bit more care in this area, as compared to the legislator in a number of other European states, but the overall tendencies have been the same.

1 Introduction

Terrorism is a complex issue and so is the legal response to terrorism. In this article we tell two tales of terrorism which focuses on two of the most striking features of the legal response to terrorism: (1) the difficulties in defining terrorism and (2) the tendency to intervene with criminal law measures (or measures similar to such measures) at a very early stage in the process towards the consummation of a terrorist offence. The first part addresses the problem of defining terrorism. For a long time it was very hard to agree on a definition of terrorism. Lately things have changed, however, and there exist, now, several instruments containing very explicit definitions of terrorism. The supposed agreement, though, seems to conceal a great deal of disagreement and we argue that the definitions are easy to apply in theory but problematic as soon as they are taken out of this context. One might say that the first part asks whether the concept of terrorism can be caught at all without reference to values. The second part addresses the tendency to criminalize acts which have a very remote connection to terrorism (as defined in the relevant instruments). It is argued that, in this regard, terrorism can be seen as one of the best examples of a more general tendency which could be labled as *preventionism,* i.e. a tendency under which the criminal law is seen as a proactive rather than reactive tool in the hands of the legislator.

2 Defining terrorism

2.1 Defining terrorism at international law

The term "terrorism" covers a multitude of different phenomena and different groups, from small "single issue" factions using force in one State to secure limited changes in government policy in it to well-armed, organised and financed entities in control of territory behaving as a quasi-government and aiming for the control of the State or the creation of a new State. There is no agreement in doctrine as to what constitutes ter-

rorism.[1] International lawyers have been trying to define terrorism since 1937.[2] There is still no *universally* accepted legal definition of the term "terrorism". It is not difficult to see why this is the case. The label of terrorism serves to de-legitimise those who use such methods.[3] Terrorists are evil. If they are evil, then it is morally wrong to try to negotiate with them.[4] And there is no point in ever negotiating with them, as they will never keep any agreement. But the deaths of civilians caused by one's own military forces in fighting wars for national defence (even if these are far away, in other countries) are of course another matter, as are deaths caused by guerrilla groups one's country supports, morally, economically or with weapons and training.

Fundamental political disagreement over how to define terrorism has meant that States have tended to focus on specific *types* of terrorism – hijacking, attacks against diplomats, etc. and agree by treaty that this conduct, at least, is not acceptable.[5] The breakthrough really came in

[1] See, e.g. A. Schmid and A. Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Databases, Theories and Literature* (2nd ed., North-Holland, Amsterdam, 1988).
[2] A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, (Hart, Oxford, 2004.)
[3] C. Warbrick, 'The Principles of the ECHR and the Response of States to Terrorism', *European Human Rights Law Review* (2002) pp. 287, 288.
[4] This is the very point of the label according to Fisk, see R. Fisk, The Great War for Civilization, Harper, Glasgow, 2007.
[5] There are 13 global multilateral treaties dealing directly with specific acts of terrorism and nine regional treaties dealing with terrorism as a whole or particular aspects of it. The ICAO has adopted the following treaties, the Tokoyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971, the Protocol to the Montreal Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 1988 and the Montreal Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991. The UN has adopted the following treaties, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973, the International Convention against the Taking of Hostages 1979, the International Convention for the Suppression of Terrorist Bombings 1997, the International Convention on the Suppression of Financing of Terrorism 1999 and the International Convention for the Suppression of Acts of Nuclear Terrorism 2005. The International Atomic Energy Agency has adopted the Convention on the Physical Protection of Nuclear Material, 1980. The International Maritime Organisation has adopted the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf,

1999, and as such is yet another result of the (temporary?) end of the Cold War, with the adoption of the UN Convention for the Suppression of the Financing of Terrorism.[6] Article 2 of this convention refers to the specific acts criminalised by the various multilateral conventions on terrorism and "[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act".[7]

There was a very slow rate of ratification of this treaty. Following the Al-Queda attacks on the US of 11 September 2001, the United Nations Security Council adopted a series of resolutions under Chapter VII of the UN Charter (UNC). These resolutions are binding upon states, by virtue of Article 25 UNC. Resolution 1373 of 28 September 2001, was the first of two (so far) resolutions where the Security Council identifies a standing threat to international peace and security and requires states to take "legislative" action.[8] It provides *inter alia* that all states shall:

> Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.

The resolution amounts, in essence, to an obligation to apply the operative parts of the 1999 Convention. It complements the (vague) obliga-

1988. All these treaties can be accessed at http://untreaty.un.org/English/Terrorism.asp *See* <www.untreaty.un.org/English/Terrorism.asp>.

[6] UN Res. 54/109, 9 December 1999, at http://www.un.org/law/cod/finterr.htm.

[7] As of 31 May 2009, there were 167 parties to the Convention, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en *Cf.* the definition employed in the EU Framework Decision on Terrorism, below, which does not exclude acts in armed conflicts.

[8] The other resolution, 1540, prescribes a duty to criminalize transfers of weapons of mass destruction (and components thereof) to terrorists. For a discussion of the compliance of these resolutions with the UNC see, e.g., R. Lavalle, A Novel, If Awkward, Exercise in International Law-Making: Security Council Resolution 1540 (2004), 51 Netherlands International Law Review, p. 411 (2004).

tions forbidding states from encouraging or financing "armed intervention" in each other's affairs which exist under customary international law and/or as authoritative interpretations of the UN Charter.[9] The 1999 convention has since been ratified by a large number of states, making its definition of terrorist acts at least quasi-universal. The important points to note here are that the definition requires an intent to harm civilians and a purpose of intimidating a population, or compelling changes of government policy. Later attempts at the UN level to produce a comprehensive definition have failed. In the imperfect world in which we live, it is, in our view quite simply not possible to produce a conceptually satisfactory definition which catches those one wants to catch (terrorists), and leaves untouched those one does not want to catch ("freedom fighters" and one's own, and friendly, military forces).

2.2 Defining terrorism at the regional European level

European states, first the Western states, but with the end of the Cold War, even the central and east European states, have participated in an international organization, the Council of Europe. This organization has long had an interest in criminal law matters and has adopted over the years a number of conventions designed to facilitate cooperation in criminal procedural issues, as well as harmonizing substantive criminal law. Even this organization of like-minded states was long unable to agree on a definition of terrorism. Instead, the 1977 Convention on the Suppression of Terrorism[10] focuses on particular methods of committing terrorist acts, and provides for mutual extentions of jurisdiction and a duty to extradite or prosecute. More recently, the Council of Europe has adopted a Convention on the Prevention of Terrorism,[11] considered further below.

The European Union (EU) has been gradually increasing its competence in criminal law matters. This process began properly in 1993 when the Maastricht-Treaty entered into force. The cooperation is still an interstate cooperation between sovereign states, but it has successively

[9] See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation between States in Accordance with the Charter of the United Nations. GA Res. 2625 (XXV), 1970 and Resolution on the Definition of Aggression, GA Res. 3314 (XXIX) 1974, Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), ICJ Rep. 1986 p. 1.

[10] 90 ETS 1977.

[11] 196 ETS 2005.

been institutionalized in a way which makes it hard to compare with other interstate cooperation. The interest of the EU in criminal law is mainly a knock-on effect of the creation of a genuine internal market. This has opened up new possibilities for transboundary organized crime. The rapid expansion of membership from 15 states in 1995 to 27 states in 2007 and including states in eastern and central Europe with extensive problems of corruption, has also made better cooperation in mutual assistance, jurisdictional issues, transfer of prosecution etc. much more urgent.[12] The EU, unlike a traditional international organisation such as the Council of Europe, contains supranational legislative elements in its first, European Community, pillar. The EC legislates by means of regulations and directives, the former automatically binding in all member states, the latter norms which have to be implemented in national law within a given period of time. The fact that members-states have partially transferred legislative competence to the EC (and thus, no longer have the competence to legislate on such matters by themselves) plus the fact that EC norms have a supra-constitutional status, which means, simply put, that they can only be challenged before the European Court of Justice, makes the whole system very much more complicated, and creates considerable accountability problems. The second – foreign and security policy – pillar is mainly a forum for the adoption of political declarations which, however, are implemented by legally binding measures at the level of EC and national law. The third – police and judicial cooperation in criminal matters – pillar adopts treaties in simplified form, framework decisions, which, like directives, have to be implemented in national law within a given period of time. Decision-making in any field where the EU is involved is multi-layered. One and the same initiative can involve measures being adopted in all three pillars, and with national implementing legislation.

The EU governments felt the need to show both solidarity with the US and a resolute approach to dealing with terrorism. They implemented

[12] The EU had been working for quite some time on the issue of a European arrest warrant which was, and is, the centrepiece in the EU efforts to create a more modern system of cooperation, and is not limited to terrorism. The Arrest Warrant framework decision [2002] OJ L 190/1 – which is a treaty in simplified form – is based on the principle of mutual recognition of an order to transfer a suspect, or fugitive convicted person, from one EU state to another. This makes transfer more or less automatic, rather than a time-consuming, and uncertain procedure of extradition. It removes the requirement of double criminality for a list of 32 offences, including terrorism.

Security Council Resolution 1373 by the adoption of two "Common Positions", 2001/930/CFSP on combating terrorism and 2001/931/CFSP on the application of specific measures to combat terrorism (both 27 December 2001).[13] These involve the "blacklisting" of suspected terrorist groups and the seizure of their assets. Providing finances to such groups is made a criminal offence. Article 1(3) of the former Common Position reads: "'terrorist act' shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of: (i) seriously intimidating a population, or (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (i) threatening to commit any of the acts listed under (a) to (h); (j) directing a terrorist group; (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group". The same article defines "Terrorist group" to mean: "a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. 'Structured group' means a group that is not randomly formed for the immediate commission of a

[13] [2001] OJ L 344/90.

terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure."

These two definitions were later incorporated in the Framework Definition on Terrorism.[14] This requires states to extend their extraterritorial jurisdiction over terrorist acts, to criminalize certain activities, in particular, directing a terrorist group and to make participation in terrorist activities subject to stiffer penalties.

2.3 Some Problems with the EU definitions

One of the major problems relates to the fact that the definitions have a global scope. They deal both with crimes within the territories of EU states and also with extraterritorial crime. The EU definitions are not limited to terrorist acts within the democratic countries of the EU, or other democratic countries in the world. The EU definitions seek to criminalise non-state groups *solely and consistently* on the basis of the methods they use, wherever these occur. Like the UN definition, there is no exception for acts directed against non-democratic regimes.[15] The focusing of attention on methods naturally caused a degree of embarrassment in that it condemns means of warfare which were used in the past by resistance forces during the Second World War.[16] It is not difficult to see why EU states baulked at inserting requirements of civilian targets or that the terrorist group be attacking a "democratic" state. Obviously, acts of terrorism in democratic states must be condemned, prevented and punished and all democratic states have a common interest in criminalizing such acts and in cooperating with dealing with them. But one problem is that "democracy" is a sliding scale: some governments are at the low end of it, but no EU state wants openly to say this to the government in question. Can one nonetheless equate a democratic with a non-democratic state

[14] [2002] OJ L 164/3.

[15] Compare the UK definition under section 1(5) of the Terrorism Act 2000, which does not impose such a requirement either. Attempts in parliament to limit the application to 'designated countries' were not successful. For criticism see C. Walker, *Blackstone's Guide to the Anti-terrorism Legislation* (Oxford, Oxford University Press 2002) 27.

[16] The EU Council adopted a statement in connection with the Framework Decision to the effect that conduct of people attempting to preserve or restore democratic values, "as was notably the case in some member states during the Second World War" "cannot be construed" as terrorist acts. See Council Doc. 14845/1/02.

on the basis that, wherever it occurs, an act of violence *directed against a civilian* is never justified?[17]

Here one should note that, unlike the UN definition, there is no requirement in the EU definitions that the terrorist act be directed against a non-military target. The European states did not want to say explicitly that military targets are legitimate targets, because this would legitimize, for example, Al-Qaida attacks against US military personnel. The problem is obvious: this definition can create an imbalance in how EU states regard what may be a political struggle between two more or less morally equal combatants in a non-democratic state, one governmental and one terrorist/guerrilla. One can argue that there is no imbalance in that wanton acts of violence by governmental forces, for example, killing civilians on a large scale or otherwise committing war crimes or crimes against humanity, can also be punished, in particular under the Statute of the International Criminal Court (ICC).[18] However, this punishment is, in practice, a fairly remote possibility. The state in question may not have ratified the ICC statute.[19] Even if it has, it is no easy business for the ICC to get hold of an alleged perpetrator, let alone gather sufficient evidence to convict him.

An organisation can employ terrorist methods, often or occasionally, but also engage in other activities (such as humanitarian aid among refugees, as do the PFLP and Hamas). Should we nonetheless regard the organization as a whole as a terrorist organization? The circumstances of guerrilla/terrorist warfare should be borne in mind. Guerilla/terrorist groups which do not have sustained control over territory tend to be organized in cells, operating more or less autonomously. In such a network of cells, there is bound to be different levels of fanaticism and brutality, depending upon the people involved. Some cells may devote much less care than others to avoiding civilian casualties. Even if terrorizing the civilian population is not the explicit aim of the organization – and few presumably write this into their statutes – there may be individual cells who embrace this with enthusiasm. Armies attract young men who like violence for the sake of it, and terrorist groups certainly do so. This is not

[17] See the Secretary General Report, In larger freedom, 2005. Cf. T. Farer, Confronting Global Terrorism and American Neo-Conservatism, Oxford UP, 2007.

[18] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (July 17, 1998), reprinted in 37 *International Legal Materials* 999 (1998); 6 IHRR 232 (1999).

[19] It is possible for the Security Council to refer a case to the ICC, notwithstanding the fact that the state in question is not a party, but the permanent member veto applies.

to say that there may not be good reasons for imposing on an organization collective responsibility for everything which one or other cell purporting to belong to the organization does. But from the criminal law policy perspective of basing individual responsibility on *actual* control over one's actions, it should be recognized such this actual control will not always, or even often, exist for the *leaders* of a group in practice.[20]

Another point is that, although the distinction is fundamental to humanitarian law, in practice, there is a grey zone between military and non-military targets. Unarmed civilians are definitely a civilian target, but what about armed civilians organised into militia units? And some of the methods associated with the most awful terrorist attacks in recent years, such as suicide bombing, are not so morally repugnant, or some would say, not repugnant at all, when directed against a military target.

It will not have escaped the reader that, while the main point we are making is that there can be morally little to choose from in a struggle between an organization operating violently in non-democratic state, and the authoritarian or dictatorial government it is struggling against, we must also face the issue of how to regard non-state combatants in a situation where a democratic state, legally, or illegally, occupies foreign territory or uses force against terrorists/guerrillas. For example, in recent years the armed forces of Israel and US have killed a great many civilians in Gaza and Iraq/Afghanistan respectively. Sweden too has peace-keeping forces in Afghanistan which have used armed force in self-defence. Should one automatically regard as terrorists the non-state combatants in such a conflict? We would say: clearly not. But should one regard them as terrorists if they cause civilian casualties? Or if they use indiscriminate weapons against civilian areas (as Hamas did against Israeli villages). Whereas a terrorist is a terrorist whether he kills one or one hundred people, the number of casualties in a conflict is of direct relevance for determining whether the threshold has been reached for an internal or international armed conflict. When that level is reached, is it not better for third states to say that terrorism is not the crime at issue, but crime against international humanitarian law?[21]

[20] The Swedish prosecutor with special responsibility for security cases decided in 2006 not to prosecute the exile leaders of the Aceh independence movement despite the fact that a number of terrorist incidents had occurred in Aceh. He took the view that the political leaders in Sweden had no command responsibility for the activities in question.

[21] For an Italian case where the court considered that terrorism as such could not be committed in an armed conflict see Office of the Public Prosecutor of the Italian Republic v

Here one can note that in humanitarian law there is a grey zone when it comes to civilian casualties which are a side-effect of an attack on a military target, so called, "collateral damage". Horrible though it is, the laws of war permit this where the civilian losses are not "disproportionate" to the end to be achieved. Indeed, though a state which purports to abide by the laws of war may not have the intention in a specific case to cause civilian casualties, and may put in efforts to avoid this, a degree of collateral damage can even said sometimes to be part of the *policy* of a state. The United States, for example, considers that humanitarian law permits a greater degree of imprecision in aerial bombardment when there are anti-aircraft defences, it being unreasonable to expect air crew to fly low and risk their lives. In the circumstances, one can certainly argue that it is hypocritical not to permit guerrilla/terrorist groups to attack "softer" military-civil targets (militia etc.) and not to allow them the same degree of "collateral damage" we permit regular armed forces.

We raise all these points to show that there are going to be some situations for a prosecutor in a liberal democratic state where she will not want to bring a prosecution for an extraterritorial crime, notwithstanding the objective wording of the crimes of terrorism and financing of terrorism. She may not want to prosecute N who has done act X in circumstances Y in foreign state Z, whereas she will want to prosecute P who has done act X in circumstances Y in foreign state W. Similarly, there will be circumstances in which this prosecutor may want to bring charges against M (acting in the prosecutor's own state) for financing P but not against Q (again acting in the prosecutor's own state) for financing N. So, an American might ask: what is the problem? The answer is that, first, solving the difficulty by relying upon prosecutorial discretion can give an unacceptable degree of uncertainty. Second, there is a knock-on effect in terms of the availability of coercive measures (dealt with further below). Third, the Swedish system is not based upon prosecutorial discretion but the principle of legality (obligatory prosecution). The scope for avoiding "inappropriate" prosecutions is much less great in the Swedish system.

Bouyahia Maher Ben Abdelaziz, Toumi Alì Ben Sassi, Daki Mohammed ILDC 559 (IT 2007). The use of terror methods against the civilian population is still an offence under humanitarian law. The main difference would lie in that the preparatory and inchoate offences (discussed later, in section 3) would not be applicable. For a Swedish case regarding financing of terrorism in an armed conflict, where the issue was not raised, see Public Prosecutor v A.B and F.J., ILDC 280 (SE 2005).

3 Terrorism and preventionism

3.1 Introduction

Above we have been discussing the problems of defining terrorism. In this section we will focus on the impact the international fight against terrorism has had on the national system(s) of criminal law and procedure and especially on the tendency to criminalize behaviour which has only a remote connection to actual terrorist attacks.

When doing this, we describe changes made in Swedish criminal law which are more or less directly attributable to the existence of terrorism and reflect on what they actually entail.

Our main point here is that the work done against terrorism reflects and enhances a general tendency in the criminal law of today, namely a tendency to upgrade the importance of prevention, not only as a general justifying aim for the criminal law system, but also as a primary task for the system.[22] The basic thought seems to be that if the system does not prevent crime efficiently, then there must (i) be something wrong with it and (ii) it must be changed in order to do so. This ultimately means that many basic principles that aim at legal security or at securing liberty, but which might limit the efficiency of the system are put under pressure. This tendency could be labeled as *preventionism.*[23]

Many of the examples of this tendency are connected to terrorism in one sense or the other and we argue that it is essential to be aware of this tendency in order to strike a balance between different interests and to protect values such as legal security and integrity.

The first example of this tendency is the increasing inclination to construct proscriptions in a way which allows for the imposition of criminal liability at a very early stage and on the basis of an evil intent on part of the perpetrator; the ideal type for this kind of liability is the one imposed for preparatory conduct ("Any person who buys matches with the intent to promote an offence, should be sentenced …").

The second example, which we will get back to later, is the ever increasing interest for the possibility to detect crime in advance, inter alia by using different kinds of surveillance measures.

[22] N. Jareborg, Vilken sorts straffrätt vill vi ha? Eller Om defensiv och offensiv straffrättspolitik, in *Inkast i straffområdet* (Iustus, Uppsala, 2006).

[23] See P. Asp, Går det att se en internationell trend? – om preventionismen i den moderna straffrätten. Svensk juristtidning 2007 pp. 69–82.

3.2 Substantive Criminal Law – towards liability for "inchoate" offences

Let us start with the area of substantive criminal law. As far as Sweden is concerned, none of the rules of substantive criminal law dealing with terrorism is "home grown". All are the result of international initiatives. As shown below, this is not the case as regards administrative law and criminal procedure.

Having said this, one should also emphasize that the carrying out of terrorist attacks regularly include acts that are, and have been, criminalized for a long time in Sweden. Moreover, and in sharp contrast to the position under US law, these criminalizations have also encompassed extraterritorial offences committed by people against foreigners and foreign interests. Put very simply, Sweden has the jurisdictional rules enabling it to punish any serious act of violence committed anywhere by anybody. Typically when we speak of terrorism we mean acts such as the causing of death, the causing of bodily harm or the causing harm to other's property. Thus, one might say that acts of terrorism are typically covered by traditional proscriptions, and that they differ from ordinary crime mainly in respect of *the purpose* with which they are committed and in respect of their *magnitude*.

Be that as it may, as a result of what is sometimes called the fourth wave of terrorism during the sixties and the seventies, a lot of international conventions were adopted mainly within the framework of the United Nations. These conventions concerned a lot of different questions, but they all included articles that required the parties to criminalize different acts typically used for terrorist purposes. If one takes a closer look at the effect of these conventions[24] on the substantive criminal law of Sweden, the impact has not been very dramatic; generally speaking they required criminalization of acts that were already criminalized under Swedish law. At times new and specific offences – corresponding to the requirements of the conventions – were introduced, but very often they overlapped with already existing offences. The convention on the suppression of the financing of terrorism is, however, somewhat of an exception, since it focuses on acts which are clearly inchoate in character and must be considered as fairly far reaching in this respect.

We will get back to this question later, but before that we should

[24] See the references in footnote 5.

take a look at the EU framework decision on the combating of terrorism. As already mentioned this includes requirements of *magnitude* (the acts shall, given their nature or context, have such a character that they may seriously damage a country or an international organization) and of a *specific intent* (the act shall be committed with the aim of seriously intimidating a population etc.) This framework decision was implemented by a special statute,[25] i.e. it was not integrated into the Criminal Code (Brottsbalken). Thus, its impact is particularly visible. Since most, or all of the acts included in the act, were already criminalized under Swedish law (also in absence of a certain magnitude and/or in the absence of a specific intent on the part of the perpetrator), the main substantive impact of the framework decision was, however, that the potential *penalties* for acts falling under the new legislation were raised. For example, the reform had as a consequence that the possibility to use life time-imprisonment for different types of terrorism related acts increased dramatically. Due to this one Supreme Court judge has characterized this as the most dramatic criminal law reform since the 18th century, when King Gustav III, by a regulation, abolished the death penalty for some 10 offences.

So far, we have implied that the criminalized area has not increased that much as a result of the struggle against terrorism; the conventions and framework decisions may have led to new criminalizations with harsher penalties attached, but they have, by and large, overlapped with old and traditional proscriptions.

In one respect, however, the fight against terrorism has clearly led to an increase in the criminalized area and that is with regard to inchoate offences.[26] One can see a general tendency within criminal law to criminalize behaviour that is not in itself harmful, but which aims at the commission of, or aims at contributing to, harmful behaviour; typically we speak of acts that are preparatory in character. And this general tendency is reflected in, and enhanced by, the work against terrorism. Let us display this with an (admittedly extreme) example.

Article 2.1 in the Convention on Suppression of the Financing of Terrorism reads as follows:

[25] The act (2003:148) on the punishment of terrorist offences.

[26] See P. Asp, Går det att se en internationell trend? – om preventionismen i den moderna straffrätten. Svensk juristtidning 2007 pp. 69–82 and P. Asp, On the Justification of Non-consummate Offences. Festschrift für Heike Jung, ed. by Heinz Müller-Dietz, 2007 pp. 29–45.

> 1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [a terrorist offence].

Thus, according to this section, the collection of money for the purpose of later sending them to someone who will use them for committing a terrorist offence should be criminalized. Already here, it is fairly obvious that we are fairly far away from the harm that we actually want to prevent, namely the harm that is caused by the consummated terrorist offence. We may speak of three steps: (i) collecting money, in order (ii) to send them (iii) to someone who will use them for some terrorist purpose.

The convention does not only, however, require the criminalization of the collection of money, but also, in accordance with article 2.4, that attempts to commit an offence that falls under the convention should be criminalized:

> 4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

Thus, the section requires that *attempts* to collect money which will later be sent to someone who will use them for the purpose of committing a terrorist offence should be criminalized. Thus we could add a fourth step to our list; the state must criminalize:

> (i) to attempt (ii) to collect money, in order (iii) to send it (iv) to someone who will use it for the purpose of committing terrorist offences.

Another way of putting it, is to say that this section requires the criminalization of an inchoate offence that relates to another inchohate offence.

But we have not reached the end yet. If one continues to read the text of the convention one finds article 2.5 which states that:

> 5. Any person also commits an offence if that person:
>
> (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;
>
> (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article.

The most interesting thing here is, for our puroposes, paragraph 2.5(b), which requires that it should be criminalized to direct others to commit an attempt to collect money which are later supposed to be handed over to someone who will use them for terrorist purposes. Once again we could add another step to our list; the state must criminalize:

> (i) to direct people (ii) to attempt (iii) to collect money, in order (iv) to send it (v) to someone who will use it for the purpose of committing terrorist offences.

Well, you might think that we with this have reached the end of the chain, but no.

In 2005 a new Council of Europe convention, focusing on the prevention of terrorism, was adopted.[27] The convention aims primarily at proscribing public provocation of terrorism, recruitment to terrorism and training for terrorism.

In order to fully understand what this means one must, of course, first understand what the convention labels as terrorism. And terrorism according to the convention is everything that counts as terrorism according to the above mentioned conventions including ancillary offences.[28] Thus, according to the Council of Europe convention on the prevention of terrorism all of the acts in the abovementioned chain of acts constitutes terrorism. This means that it is terrorism to:

> (i) direct people (ii) to attempt (iii) to collect money, in order (iv) to send it (v) to someone who will use it for the purpose of committing terrorist offences.

And in relation to this very "inchoate" definition of terrorism, the prevention convention adds yet another layer.

First it requires the criminalization of public provocation to commit a terrorist offence, recruitment to terrorism, and the training for terrorism. This means, *inter alia*, that the convention requires the criminalization of:

> (i) the recruitment of people (ii) to direct people (iii) to attempt (iv) to collect money, in order (v) to send it (vi) to someone who will use it for the purpose of committing terrorist offences.

[27] See footnote 11 above.

[28] Article 1.1 of the Convention.

And since this is an international convention within the area of substantive criminal law it does, as most conventions do, also contain an article, article 9, which deals with ancillary offences. And article 9 requires, *inter alia*, the criminalization of attempts to recruit people to terrorist acts, thus adding yet another layer to our chain. Formally the convention requires the criminalization of:

> (i) an attempt (ii) to recruit people (iii) to direct (other) people (iv) to attempt (v) to collect money, in order (vi) to send it (vii) to someone who will use it for the purpose of committing terrorist offences.

Having seen this chain, a natural question to ask might be: Is this really what the drafters of the convention intended? The answer is actually both yes and no. In the explanatory report one finds the following statement:

> In paragraph 1, the offences are defined by reference to the treaties in the Appendix. The reference to the offences "within the scope and as defined" in the conventions listed in the Appendix indicates that, in addition to the definitions of crimes, there may be other provisions in these conventions that affect their scope of application. This reference covers both principal and ancillary offences. Nevertheless, when establishing the offences in their national law, Parties should bear in mind the purpose of the Convention and the principle of proportionality as set forth in Article 2 and Article 12, paragraph 2 respectively. The purpose of the Convention is to prevent terrorism and its negative effects on the full enjoyment of human rights and in particular the right to life. To this end, it obliges Parties to criminalise conduct that has the potential to lead to terrorist offences, but it does not aim at, and create a legal basis for, the criminalisation of conduct which has only a theoretical connection to such offences. Thus, the Convention does not address hypothetical chains of events, such as "provoking an attempt to finance a threat".[29]

Thus, to summarize one might say that the convention formally covers the chain of acts I have been describing, but at the same time it is said that it does not aim at creating a legal basis for criminalization of conduct which has only a theoretical connection to terrorist offences. Perhaps it is fair to say that the very far reaching formal requirements of the convention are supposed to be implemented with reason.

Well, then, what is the point of displaying this chain? Well, it is not to say that these international agreements are by necessity a great problem

[29] See the Explanatory Report paragraph 49.

if looked at from a national perspective. It will, most certainly, and inter alia thanks to the statements of the explanatory report, be possible to implement the convention in a way which is acceptable from a principled as well as a practical point of view. Actually, one of us (Asp) has on behalf of the government written the official report in which it is proposed that Sweden should ratify the Council of Europe convention and which also includes suggestions on how to implement it and an EU framework decision which involves similar obligations relating to criminalisation of promoting terrorism.[30]

The point has rather been to show that the general tendency towards the criminalization of non-consummate offences is definitely reflected and enhanced through the struggle against terrorism. We would suggest that this reflects an increased emphasis on prevention that, at least in the long run, creates risks from the viewpoint of legal security.[31] We will get back to the risks after having said a few words on the use of coercive measure and surveillance measures for the puropose of combating terrorism.

3.3 The use of surveillance, coercive measures etc.

The other story to be told is the Swedish history as regards the use of coercive measures and individualized surveillance for preventive reasons. Generally speaking the authority to use coercive measures and different measures of surveillance such as secret wiretapping, secret tele-surveillance etc. has presupposed that someone is reasonably suspected of having committed an offence. During the second world war Sweden had some

[30] Straffrättsliga åtgärder till förebyggande av terrorism Ds 2009:17, http://www.regeringen.se/content/1/c6/12/59/75/1194e7ae.pdf.

[31] The concept of "legal security" (*Rechtssicherheit*) is fundamental to Germanic-influenced legal orders. There is no definitively agreed content to the concept. Elements generally considered to be part of it are free and independent courts bound by law, the right of access to court to challenge coercive state measures, the need for criminalization and coercive state measures to have clear support in law, the prohibition of legislating to cover a single case, the prohibition of retroactive legislation and a requirement that crimes be proved beyond reasonable doubt. Foreseeability (legal certainty) is thus an important part of the concept, but does not exhaust it fully. The concept tends to be used to evaluate critically the *lawful* exercise of authority. The closest approximation to it in common law is another concept with unclear contours, namely the rule of law. See N, Jareborg, Straffrättsideologiska fragment, Iustus, 1992, pp. 80–94. For a discussion in English, see Å. Frändberg, Some reflections on legal security, in Philosophical Essays dedicated to Lennart Åqvist on his fiftieth birthday, Pauli, Uppsala, 1982.

legislation allowing for such measures to be used without any suspicion of an offence, but that was, of course, an exception justified having regard to the special situation during the war.

In the seventies, however, after having experienced two terrorist attacks – the murder of the Yugoslavian ambassador in 1971 and the hijacking of an airplane on its way between Stockholm and Gothenburg in 1972 – a new act on "the prevention of certain violent acts with an international background", the so called Terrorist Act, was enacted.[32] This piece of legislation has been amended – and changed names – on several occasions (in 1975, 1989 and in 1991), but we do not have to go into details. The special feature that we want to highlight in this context is that the Act – at the time it was introduced – was special since it was the only act that allowed for the use of certain types of coercive measures, and surveillance measures – such as search of premises, body search, body examination and secret telephone tapping – also in relation to persons who are not suspected of having committed any offence.

According to § 19 of the Act a foreigner may – under certain preconditions – be subject to search of premises, body search and body examination if it is needed to find out whether the foreigner or an organisation or a group to which he belongs are taking steps towards or planning or preparing a terrorist offence. If there are extraordinary reasons secret wire tapping and secret tele surveillance (i.e. registering of telecommunications data, numbers, duration of call etc.) may also be used. Thus, the use of the measures does not presuppose that an offence has been committed, but merely that the use of the measure is needed to find out *whether* an offence is planned.

As indicated, this was a clear exception to the general rule, that coercive measures and surveillance may be used only when someone is suspected of having committed an offence of a certain dignity.

The suggested justification of this breakthrough was that some people who cannot be expelled due to humanitarian reasons (because the only state prepared to receive them may subject them to torture or the death penalty) might constitute a threat to national security. Thus, in order to be able to let these people stay, we must have tools for maintaining that the threat they may pose to national security is minimized.

The Act was heavily criticised during the seventies. The critics argued among other things that the act was discriminatory, that it presupposed

[32] Now the Act on Special Control of Aliens 1991:572.

that terrorist offences are only carried out by foreigners and that the prerequisites for the use of coercive measures were too generous.

In the 1989 a legislative committee dealing with terrorism wrote as follows:

> "The committee has considered whether it would be possible to meet the need which has been shown to exist by means of general rules in the Code on Judicial Procedure. However, it appears difficult to have such a solution without drastically diminishing the level of protection offered. It is in the committee's view hardly possible to introduce the possibility to take coercive measures against serious crime in general on the relatively vague grounds the Terrorist Act allows. This would involve making major changes in the system of rules set out in the Code of Judicial Procedure of a character which, from the perspective of principle, would seem extremely suspect. It is incontrovertible that the rules in the Terrorist Act diverge from the demands placed by legal security which have traditionally been upheld in our country. As already mentioned, these rules obtain their legitimacy precisely by reason of the fact that they are directed against a very small group of people who we do not want in the country because they represent a danger, but who are nonetheless permitted to stay here for humanitarian reasons."[33]

Even clearer was the opinion of the committee dealing with the powers of the security police a year later:

> "Such rules (that is rules that do not presuppose a suspicion of a concrete offence) exist in the Terrorist Act. Those rules must, however, be regarded as an exception from a basic principle the content of which is that coercive measures may be used only if there is a suspicion that a concrete offence has been committed. The exception in the Terrorist Act can be justified only as a consequence of Sweden's right to chose which foreigners that are allowed to stay in the country."[34]

To summarize: the official view seems to have been that the use of coercive measures without a connection to a reasonable suspicion that a criminal offence has been committed can be justified only under exceptional circumstances.

[33] SOU 1989:104 s. 220, authors' translation.
[34] SOU 1990: 51, authors' translation.

Recently, however, a new act on the use of coercive measures for preventive reasons was enacted.[35] According to this legislation the court can authorize the use of secret wiretapping, secret tele-surveillance and secret camera surveillance on the condition that it, having regard to the circumstances, has reason to believe that a person will perform criminal acts including certain listed offences (such as sabotage, arson, terrorist offences and murder). Thus we can see a clear shift in attitude. What was considered exceptional and basically inappropriate only some fifteen years ago, is now apparently acceptable. And if one reads the preparatory works, the threat from international terrorism is obviously the main thing that has contributed to this shift in views.

We are not suggesting that it is the use of surveillance measures for preventive reasons is unacceptable under any circumstances. On the contrary, it seems clear that in Sweden we might have been focusing too much on the very well regulated area of the use of coercive measures for investigative reasons, while underestimating the implications of the expansion of proactive measures and of the even more speculative "strategic surveillance".[36] What we would like to do is simply to draw attention to the shift in attitude that seems to have been taken place. In the beginning of the 1990s it was clearly expressed that the use of coercive measures without reference to a committed offence could be justified only under exceptional circumstances (i.e. only against persons who we would expel if only it was possible). Now we have introduced rules that, at least on the level of principle, are comparable and they are applicable in relation to all citizens. In our view, this shift in attitudes invites us to reflect upon the development. What has changed? Is the new situation such – so different from the situation some fifteen year ago – that it justifies the new measures?

[35] SFS 2007:979.

[36] In Sweden during 2008, a government bill allowing the Defence radio interception organisation, Försvarets Radio Anstalt (FRA) also to monitor all international telecommunications transiting Sweden by way of cable traffic, caused a storm of public protest. The original bill (prop. 2006/07:63) was passed, but a new bill has been prepared during 2009 (prop. 2008/09:201, Förstärkt integritetsskydd vid signalspaning) providing for improved safeguards.

3.4 Preventive Freezing of assets

This is a large and complicated chapter in itself. We will not go into this in detail in the present paper.[37] There is an EU norm requiring member states to criminalize the conduct of belonging to a criminal organization. But there are special constitutional difficulties in Sweden of criminalizing membership of organizations. Prohibition of an organization is legally possible under the constitution (RF 2:14) if a statute is passed on the matter. However, such a statute has not been passed. Registration of an organization is not a public law requirement for the organization to begin its activities, and so prohibition of an organization would be easily circumvented.[38] Active participation in a grouping committing criminal acts is, however, largely caught in Sweden by the relatively wide provisions on participation in crime. So far the European Commission – charged with overseeing how EU norms are implemented in national law – has accepted that Sweden need not formally criminalize membership of criminal organizations. But there are indications that this excuse will not be accepted so much longer.[39]

Moreover, as far as concerns financing of terrorism, the Swedish restrictions on criminalizing organizational membership have been circumvented. Simply put, the EU has implemented Resolution 1373 by creating a blacklisting system. It resembles the US system of blacklists, and has borrowed a lot from this. The EU acting unanimously adopts a sanction, listing a named organization. The listed organization in its entirety is regarded as being terrorist in character. Anyone giving money or anything of value to it (such as the lease on property), or handling money or anything of value on its behalf, is committing a criminal offence.[40]

[37] See I. Cameron, EU Anti-terrorist Blacklisting, 3 Human Rights Law Review, s. 225–256 (2003) and UN Targeted Sanctions, Legal Safeguards and the ECHR, 72 Nordic Journal of International Law 1-56 (2003).

[38] SOU 2000:88 Organiserad brottslighet, hets mot folkgrupp, hets mot homosexuella, m.m. – Straffansvarets räckvidd kap. 16.

[39] Commission evaluation of Sweden, European Commission, Report and annex based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism COM(2007) 681 final 6.11.2007.

[40] The EU system of blacklisting is examined in detail in I. Cameron, Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play, European Parliament, Policy Department, External Policies, October 2008, http://www.europarl.europa.eu-/activities/committees/studies.do?languageE.

Once the organization is blacklisted by executive decree, on US experience, on largely unreviewable grounds,[41] there is no need to show a further terrorist intent on the part of people giving money to it, or receiving money on its behalf. The blacklisting mechanism neatly avoids having to submit intelligence material to a court in a criminal case. We accept that there can be good reasons for this in common law systems relating to the nature of the criminal trial (jury trial, and correspondingly strict rules on admissibility of evidence). However, in Sweden the principle of free evaluation of evidence applies. There is correspondingly a lesser need for such offences.[42]

This type of offence creates a problem for the legitimacy of the law in a country with a large immigrant population from a country with an ongoing conflict between an authoritarian regime and a terrorist/guerrilla group. And, internationally speaking, the EU, and EU states, will no longer perceived as an honest broker in this conflict. One 'side' is able to operate freely in EU states, and its property may well be protected by diplomatic immunity, whereas the other 'side' is having its assets seized, and it is a criminal offence to support it financially in any way.[43]

Sweden introduced this form of blacklisting by the "back door", by making the existing statute imposing penalties for violation of UN and EU sanctions applicable to such executive EU decisions to blacklist organisations. That Sweden has been prepared to do this, in clear breach of its ordinary principles of criminalization shows the pressure it has been under.

[41] People's Mojahedin Organization of Iran, v. United States Department of State, 182 F.3d 17 (D.C. Cir. 1999) "The information [consists of] sources named and unnamed, the accuracy of which we have no way of evaluating … We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true … Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received – something we have no way of judging." (pp. 23, 25) We will not here go into the long – and as yet unfinished – saga concerning the establishment of meaningful review mechanisms at the EU level. See Cameron, ibid.

[42] This is illustrated by the already mentioned Swedish court of appeal case (above note 21) where a complicated flow chart was submitted by the Security police showing the network of communications between the accused and people belonging to the group Ansar al-Islam, linked to a number of terrorist deeds in Iraq.

[43] This imbalance was the reason why Norway – not a member of the EU – later refused to follow the EU blacklists. Norway, Ministry of Foreign Affairs, press release 5 January 2006, http://www.statewatch.org/terrorlists/terrorlists.html.

3.5 The risks with the tendency

In the above sections we have tried to describe a tendency which we have labeled as *preventionism.* We have not, however, said anything about whether and if so, why, there are reasons to be worried about the tendency. So, why should we worry? We would suggest that there are at least four interconnected reasons for being concerned.

First, one should be aware of the logic of prevention. Prevention is a future oriented rationale, and the standard for measuring success is simply whether something (e.g. a terrorist offence) has been prevented or not. One can express this by saying that the logic of prevention is empirical in character, and that normative concerns are not built in to the concept.[44] This lack of a *normative* standard is in itself dangerous: it is, and it will always be, fairly easy to cause harm (i.e. to kill a person). We cannot therefore only ask ourselves what measures are necessary in order to prevent something (e.g. terrorist acts). There is no end to the measures necessary to prevent an act.[45] We must also and constantly ask ourselves what measures are *reasonable* to take. To summarize one could say that *the logic of prevention creates risks for excessiveness.*

Second, the focus on prevention means that the criminal law system is seen as a "problem solving" system, which ultimately leads to a pressure on the legislator to change the law in order to achive results. This creates risks for increased repression (if the things done are not enough, then we must have more of the same) and a pressure on the legislator to make exceptions from such basic criminal law principles (based on notions of fairness and individual autonomy) which might limit the efficiency of the system. Thus, one might say that *the tendency to see the criminal law system as (merely) a tool for prevention creates risks for increased repression and exceptions from basic fairness standards.*[46]

[44] See W. Hassemer, Strafrecht, Prävention, Vergeltung, Zeitschrift für Internationale Strafrechtsdogmatik, 2006 p. 270.

[45] We refer to Oren Gross' chapter in this volume for a discussion of the psychological and other factors which make it easier for people to see the benefits in "more" security and to underestimate the price which is paid in terms of loss of integrity.

[46] See P. Asp, Går det att se en internationell trend? – om preventionismen i den moderna straffrätten. Svensk juristtidning 2007 p. 80 f.

Third, the general tendency to build responsibility on preparatory acts (which might be quite innocent seen in an objective perspective) increases the importance of an "evil intent". The evil intent becomes (more or less) the one and only thing that distinguishes a serious crime from innocent everyday conduct. Since the evidentiary problems as regards intent are big (and this is especially true as regards acts that are "innocent" and therefore possible to interpret in different ways), this general tendency towards criminal responsibility built on ulterior intent are negative in a rule of law perspective: *the tendency to intervene with criminal law at a very early stage creates risks for wrongful convictions.*[47]

Fourth, the tendency to focus on prevention enhances a tendency to focus on dangerous people, rather than on harmful acts; if one wants to prevent things it is more important to find the people that are dangerous, than to punish single criminal acts, and once this view has got hold of us, we are not far from a division of people into two categories: on the one hand we have "us" (the decent citizens that should be protected), and on the other we have "them" (the dangerous people that we should try to protect ourselves from). Thus one might say that *the tendency to focus on prevention creates risks for a new relation between state and citizen and ultimately for a enemy-based criminal law system.*[48]

Having said this one should emphasize that we see preventionism as a tendency which gives rise to concern, not as a full blown disease. Thus, we are not saying that we have passed the border to the unacceptable, but merely that we should be careful in trying to avoid doing so. Terrorism poses a serious threat to our society. It is natural and fully justifiable to try to prevent terrorist attacks from occurring. However, when trying to do this we should be careful not to find solutions worse than the problem.

[47] See E.J. Husabo, The Implementation of New Rules on Terrorism Through the Pillars of the European Union, Harmonization of Criminal Law in Europe, ed. by Husabo and Strandbakken (2005), p. 74 f.

[48] See P. Asp, Går det att se en internationell trend? – om preventionismen i den moderna straffrätten. Svensk juristtidning 2007 p. 79 f.

4 Concluding Remarks

We will not repeat the points already made, especially in sections 2.3 and 3.5 above. In this concluding section, we content ourselves with making a few remarks relating to the comparative (Swedish/US) perspective.

The first point we would make is that there is a (relatively speaking) strong Swedish reluctance to engage in symbolic criminalization. This is linked to the fact that Sweden applies the principle of legality as regards prosecution, in contrast to the position under both federal and state criminal law in the US. The principle of legality increases the need for care in formulating the offence, because less discretion is available to the prosecutor at when he or she is faced with the decision to bring a prosecution. Related to this is the second point, that there still appears to be a more widespread awareness among Swedish law-makers as compared to American (or European) law-makers that criminalization will not solve underlying social or political problems. Terrorism is crime with a political objective. Sweden has not been the subject of many terrorist outrages, and so the much vaunted Swedish tolerance and liberalism has not been put to the test. In this sense, the moral high ground which Swedes like to see themselves as inhabiting may not be very secure. But the relative absence of terrorist threats in Swedish society is not the product of chance, but a combination of different factors. The first line of defence of Sweden itself is the welfare state and the inclusiveness of Swedish society. So far, this line of defence is holding, and terrorism is still seen largely as a problem for other states. At the same time, Swedish law-makers, police and prosecutors are aware that terrorists can both use Sweden as a base for gathering resources and as a – relatively weakly defended – place to attack foreign interests. For this reason, it is accepted that criminalization of financing of terrorism and inchoate (preparation etc.) offences is necessary, as is more extensive police or intelligence powers. And it is clear that a future free from serious terrorism is certainly not guaranteed even in Sweden. There are, for example, alienated immigrant communities in Sweden too and the more extensive, and more savage, the conflicts which affect other states, the more likely that sections of these exile communities will be drawn into these conflicts. However, increased criminalization and increased police powers must not contribute towards the very problem – alienation – they were designed to guard against. As already made clear in this article, most of the Swedish anti-terrorist legislation has an international and European origin. If Sweden had more of a say

in European and world anti-terrorism policy it would probably focus less on criminalizing and more on doing something about the – much more challenging – structural causes of terrorism. While making the world a better place in a wishy-washy liberal Swedish sort of way will not eliminate political violence, if the political injustices which are the root, or the excuse, for the violence are removed or ameliorated, then at the very least the supply of new European recruits to terrorism will be made more difficult.[49]

Another point, which perhaps is difficult for US lawyers to grasp, is the extent to which Swedish criminal law policy in this area is steered by developments within the EU, which itself is influenced to some degree by American pressures. We think that international and European lawyers have been naïve or have shown hubris in thinking that they can "solve" what are essentially disputes over values with a "neutral" legal definition of terrorism. This article has largely been devoted to the "one size fits all" problems which emerge when legislation dealing with a fundamental part of sovereignty, namely central concepts of criminal law and criminal procedure, becomes partly the domain of international organizations, the UN and the Council of Europe, and partly the domain of the EU, which is something between an international organization and a proto-federal state. The EU definitions which have been discussed in the present article should admittedly not be seen as dictates directed to the states.[50] The national parliaments did have the possibility of influencing the content of the various definitions. But they had relatively little time in which to do so, and the room for maneuver was much more limited than a traditional international law negotiation. The result of this is a certain "delegitimation" of the end-product. And as already mentioned, procedural and other problems emerge from the supra-national status of EC law. Criticism has certainly been voiced of the EU fixation with terrorism as distorting the EU criminal law agenda leading to a risk of long-term loss in confidence for the European project.[51] A similar criticism can be

[49] Compare Council of Europe Parliamentary Assembly Resolution 1271, which notes that higher levels of education, access to decent living conditions and respect for human dignity are the best instruments for reducing the support given to terrorism in certain countries.

[50] See, e.g. K. Nuotio, Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law, 4 Journal of International Criminal Justice pp. 998–1016 (2006).

[51] Nuotio ibid.

made against the UN blacklisting measures in relation to terrorism, but not the UN Convention against Financing of Terrorism – which was drafted with care, and leaves room for states to take into account value conflicts and makes it easier to avoid oppressive prosecutions. As regards the Council of Europe treaty on prevention of terrorism which we discuss in section 3, this, like the UN Convention against Financing of Terrorism Sweden can formally decide freely to ratify or not. However, in practice, it is difficult for Sweden to abstain from ratification. In any event, parallel legislative developments within the EU have reached, or are in the process of reaching, the same result.

US lawyers may find alien the idea that, in practice, the content of central areas of criminal law and criminal procedure are being heavily influenced by international organizations. But in another sense, this situation – where the legislature has passed legislation which is not entirely rational, or, at least, not well-enough thought through – will be very familiar to US lawyers. The US courts have long played the role of trying to ameliorate or minimize problems with both state and federal legislation which has been passed hastily, in response to public pressure, or perceived public pressure. Such an approach, however, involves something of a change in emphasis for Sweden. We put the emphasis on the legislature, making sure that the law is as well thought out as possible from the beginning, rather than expecting that the judges will afterwards check constitutionality, smooth over deficiencies, cutting down "overbroad" criminal provisions and otherwise trying to curb "oppressive" prosecutions. We will, in the future, have to think a bit more about what can be done at the negotiation and implementation stages of EU and Council of Europe norms to ameliorate problems which inevitably arise from the "one size fits all" solution. However, we will probably also have to encourage a bit more activism on the part of our judges when it comes to applying criminal law with a "European" origin. The need to protect fundamental – albeit only implicit – Swedish values in this controversial area, must be squared with the legal requirement on Sweden, as all EU member states, to apply European law loyally.

Oren Gross[1]

Security *vs.* Liberty: An Imbalanced Balancing

"The metaphor of balancing the public interest against personal claims is established in our political and judicial rhetoric …"[2]

"As a matter of attitude, the language of 'balancing' is apt language, easily conformable language, for the job of cutting down to what somebody thinks is comfortable size the claims to a sometimes awkward human freedom which the Bill of Rights set out to protect."[3]

"[T]he idea of trading off freedom for safety on a sliding scale is a scientific chimera … Balance should not enter the equation; it is false and misleading."[4]

[1] Irving Younger Professor of Law and Director, Institute for International Legal & Security Studies, University of Minnesota Law School.

[2] Ronald Dworkin, *Taking Rights Seriously* (1977) 198.

[3] Charles L. Black, Jr., 'Mr. Justice Black, the Supreme Court, and the Bill of Rights' *Harper's Magazine*, February 1961, 63 at 66. See also Mordechai Kremnitzer, 'National Security and the Rule of Law: A Critique of the Landau Commission's Report', in *National Security and Democracy in Israel* (Avner Yaniv ed., 1993) 153 at 170–71 (arguing that if it is true that "in a normal utilitarian balancing process the value of human dignity does not stand a chance against the value of human life," then "the value of human dignity should be protected by taking it out of the balance, making it … a part of natural law" (quoting Winfried Hassemer)); Thomas Nagel, 'War and Massacre', in *War and Moral Responsibility* (Marshall Cohen et al. eds., 1974) 3 at 9 ("Once the door is opened to calculations of utility and national interest, the usual speculations about the future of freedom, peace, and economic prosperity can be brought to bear to ease the consciences of those responsible for a certain number of charred babies.").

[4] Philip Thomas, 'Emergency and Anti-Terrorist Powers 9/11: USA and UK' (2003) 26 *Fordham Int'l L. J.* 1193 at 1208.

The metaphor of balancing and the use of "balancing tests" are dominant features in legal discourse. They have become so ubiquitous across many jurisdictions around the world that some have identified "a transition from 'balancing' as a feature within fundamental rights adjudication to 'balancing' as an emblematic characteristic of entire legal systems and cultures."[5] The perceived inevitability of the need to engage in some sort of balancing has rendered balancing, as a conceptual methodology and form of constitutional interpretation and reasoning, almost unchallengeable. While we may argue about particular outcomes of balancing, there seems to be little, if any, point in arguing about the need *to* balance.[6] It has even been suggested that the concept of balancing constitutes an element of the "ultimate" rule of law.[7]

Balancing is offered as a theory of constitutional interpretation and adjudication that identifies competing interests, e.g., individual rights and governmental powers, and then values and compares them.[8] It rejects calls to treat interests as absolutes that may never be balanced off against other interests. A proper balance must be struck between them. Since the terrorist attacks of September 11, 2001, the metaphor of balancing has been invoked so regularly to explain the need for a trade-off between liberty and security that it has become an "ambient feature of our political environment."[9]

If the metaphor of balancing has become dominant in legal and constitutional discourse, the terminology of utilitarian cost-benefit analysis has come to dominate, certainly in the United States, the exercise of balancing tests.[10] In this context, balancing tests assume that those who engage in the act of balancing are rational actors, who engage in rational

[5] Jacco Bomhoff, 'Balancing, The Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law' (2008) 31 *Hastings Int'l & Comp. L. Rev.* 555 at 556.

[6] A "weaker" version is offered by the former President of the Israeli Supreme Court, Aharon Barak, when he writes that: "'balancing' and 'weighing,' though neither essential nor universally applicable, are very important tools in fulfilling the judicial role." Aharon Barak, 'The Supreme Court 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard L. Rev.* 16 at 93.

[7] David Beatty, *The Ultimate Rule of Law* (2004).

[8] T. Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale L. J.* 943 at 945.

[9] Jeremy Waldron, 'Safety and Security' (2007) 85 *Nebraska L. Rev.* 454 at 455.

[10] Russell B. Korobkin & Thomas S. Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 *California L. Rev.* 1051 at

decision-making, seeking to maximize their own (or social) ends, while also possessing knowledge and capacity to assess the potential outcomes and consequences of their actions. In other words, those engaged in the act of balancing are able to estimate accurately both the benefits and harms that are involved and the probabilities of uncertain outcomes.

The general critiques of balancing tests are well known and can be noted here briefly. Balancing is based on the ability (of judges, for example) to identify correctly the competing interests and to assign them appropriate weight as well as to compare the respective weights of the relevant interests. However, determining which interests and what factors are relevant in any given case and which ought to be balanced against each other may prove highly problematic.[11] The problem of commensurability further exacerbates the challenge. It is often argued that certain interests, values, or factors cannot be measured by any common currency or on a same scale and therefore cannot be compared, or balanced, one against the other.[12] The inherent link between commensurability and balancing highlights the ideological choices that are involved in the concept of balancing. Some consequentialist theories regard all values as commensurable, whereas other moral theories, such as deontological or virtue ethics, reject that claim and deny not merely the desirability but the possibility of balancing in circumstances involving certain interests and values. Furthermore, in all but simple cases, balancing tests undermine predictability and offer less by way of general guidance than bright-line rules.[13] Balancing tests are regarded by their detractors as "subjective," and "manipulable."[14] The lack of objective criteria for valuing the relevant interests and for establishing the appropriate basis for comparing them results in decisions that are suffused with the decision-makers' own personal preferences while coated with a veneer of seemingly objective

1062–63; Jonathan S. Masur, 'Probability Thresholds' (2006–07) 92 *Iowa L. Rev.* 1293 at 1299.

[11] Aleinikoff, 'Age of Balancing', p. 977.

[12] Frederick Schauer, 'Commensurability and Its Constitutional Consequences' (1994) 45 *Hastings L.J.* 785 at 786. There are those who argue that even if we accept that the relevant values and interests could be somehow compared, or balanced, one against the other, we should still make the choice not to do so.

[13] Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *U. Chi. L. Rev.* 1175 at 1186.

[14] See, e.g., *Blakely v. Washington*, 542 U.S. 296 at 307–08 (2004) (Scalia J.).

rhetoric.[15] In the context of judicial decisions, balancing tests also result in less transparent judicial opinions since the judges are utilizing balancing-speak as a shield in order to avoid the need to elaborate on the sources that they used to evaluate the weights of the relevant interests and to compare them. At the same time, the scientific-like rhetoric of balancing by courts reduces the opportunity for a meaningful constitutional dialogue and interaction among the various branches of government as well as between them and the general public.[16]

Balancing also presents significant questions that pertain to institutional concerns and to the nature of the constitutional legal adjudicative project. Judicial balancing seems to replicate the work done by the legislative branch of government with no inherent reason to assume that courts are positioned to arrive at a better, more accurate, calibration of interests.[17] At the same time, Aleinikoff argues that balancing undermines our understanding of constitutional law as an interpretive enterprise, transforming it into a general discussion of the reasonableness of governmental conduct. Thus, "[u]nder a regime of balancing, a constitutional judgment no longer looks like a trump. It seems merely to be a card of a higher value in the same suit."[18]

This Article focuses on challenges to balancing that are either unique or somehow exacerbated in the context of responding to violent crises. It argues that when faced with extreme violent emergencies (real or perceived), the public and its leaders are unlikely to be able to assess accurately the risks facing the nation. In those circumstances an act of balancing between security and liberty is likely to be biased in ways that ought to be recognized and accounted for. Furthermore, the pressures exerted by acute exigencies on decision-makers (and the public at large), coupled with certain unique features of crisis mentality and thinking, are likely to result in a systematic undervaluation of one interest (liberty) and

[15] Aleinikoff, 'Age of Balancing', pp. 992–95; Barak, 'A Judge on Judging', p. 95 ("Naturally, acts of balancing and weighing are not scientific in nature. They do not negate the existence of judicial discretion. Nonetheless, they confine such discretion to those situations in which the legal system fails otherwise to clarify the relative social status of the conflicting values and principles. In this respect, one should not trade one extreme for the other. Just as balancing and weighing do not negate judicial discretion entirely, these techniques also do not constitute an open invitation for judicial discretion in every case.").

[16] Aleinikoff, 'Age of Balancing', p. 992.

[17] *Id.*, p. 984–86.

[18] *Id.*, p. 992.

overvaluation of another (security) so that the ensuing balance would be tilted in favor of security concerns at the expense of individual rights and liberties.

This argument does not depend on a claim that the presence of risk turns individuals and decision-makers into irrational actors. Rather it is of more modest proportions, suggesting that there are certain challenges to the rational actor model that are somehow exacerbated in the context of responding to violent crises. Those challenges suggest that acts of balancing in this context are likely to be systematically biased and that our ability to analyze and measure risk accurately is prone to suffer from endemic distortions.[19] The systematic nature of those biases suggests that failure to address them may turn the mistakes and errors that are discussed below into cognitive pathologies, i.e., decision methods that are not only mistaken but irrational.[20]

* * *

Individuals operate under certain cognitive limitations and biases that may prevent them from capturing the real probabilities of the occurrence of certain types of risks and uncertainties. Because accurate risk analysis requires information pertaining to both the magnitude of the risk and the probability of that risk materializing, such cognitive limits color our risk assessment and create a strong tilt toward putting undue emphasis on certain potential risks. While similar observations hold true in a wide variety of areas, the risks involved in acute national crises, in general, and in violent threats, in particular, coupled with other factors that undermine rational decision-making, have a special tendency to trigger such cognitive limitations and biases due not only to their potential magnitude, but mostly due to the manner in which they are perceived.

The concept of "bounded rationality" relates to our limited knowledge and computational imperfections and explains our failure to process

[19] The remainder of this article considers bias that results from the use of cognitive heuristics. For an approach that considers emotions and risk perceptions to be a form of expressive perception that links risk management options with a person's values, allowing for rational cultural evaluations of risk. Dan M. Kahan, 'Two Conceptions of Emotion in Risk Regulation' (2008) 156 U. Pennsylvania L. Rev. 741 at 748–52 (discussing the "Cultural Evaluator" theory).

[20] Roger G. Noll & James E. Krier, 'Some Implications of Cognitive Psychology for Risk Regulation' in Cass R. Sunstein (ed.), *Behavioral Law & Economics* (2000) 325 at 327.

information perfectly. As Herbert Simon explains it: "The capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problems whose solution is required for objectively rational behavior in the real world—or even for a reasonable approximation to such objective rationality."[21] Not only may we not possess all the relevant (and complex) information that is required to formulate and solve such complex problems, but it is suggested that even if we did possess perfect information we would not have been able to formulate or solve these problems. For example, an important element of information processing and analysis is the time needed to investigate consequences and alternatives. Violent emergencies, characterized by sudden, urgent, and usually unforeseen events or situations that require immediate action, often without time for prior reflection and consideration, accentuate the problems related to our ability to process information and evaluate complex situations. Hence, such crises tend to lead to an increased reliance on cognitive heuristics—shortcuts that people use when making decisions—as a means of countering the lack of sufficient time to properly evaluate the situation.[22] Generally, the use of heuristics makes perfect sense and is rational as it "reduce[s] the time and effort required to make reasonably good judgments and decisions."[23] However, the most common heuristics may create patterns of mistaken assessments.[24] Those patterns are further reinforced when heuristics are applied in times of crisis.

* * *

The *availability heuristic* means that individuals tend to link their assessment of the probability of an occurrence of a particular event to their ability to imagine similar events taking place.[25] The easier it is to recall

[21] Herbert A. Simon, *Models of Man: Social and Rational* (1957) 198; Korobkin & Ulen, 'Removing the Rationality Assumption', pp. 1075–76.

[22] See, e.g., Melissa L. Finucane et al., 'The Affect Heuristic in Judgments of Risks and Benefits' (2000) 13 *Journal of Behavioral Decision Making* 1 at 5–8 (the effects of time pressure on the (inverse) relationship between perceived risks and perceived benefits of an activity).

[23] Scott Plous, *The Psychology of Judgment and Decision Making* (1993) p. 109; Noll & Krier, 'Some Implications of Cognitive Psychology for Risk Regulation', p. 327.

[24] Plous, *The Psychology of Judgment and Decision Making*, pp. 131–44.

[25] Amos Tversky & Daniel Kahneman, 'Availability: A Heuristic for Judging Frequency

an event—the more familiar we are with it, for example, from personal experience—the more we are likely to overestimate the likelihood of its occurrence in the future.[26] Such events are not merely abstract notions, but rather are tangible and real and hence also more probable events. Moreover, experiential familiarity is not a necessary condition for "availability." The stronger and the more vivid and salient the images that are associated with a particular event are—the closer they are in space or time, the more emotionally exciting they are, or the more concrete and "image provoking" they are—the more such events are going to be perceived as likely to occur in the future, even if not experienced personally.[27] As the two pioneers in this field, Amos Tversky and Daniel Kahneman, note: "[T]he impact of seeing a house burning on the subjective probability of such accidents is probably greater than the impact of reading about a fire in the local paper."[28] The images linked to the September 11, 2001, terrorist attacks—the planes hitting the Twin Towers, the towers crumbling down, firefighters and police officers battling against time, and people jumping to their death—were exceptionally powerful. Moreover, the attacks have been followed by obsessive public discussion of possible future attacks, regardless of any meaningful analysis of the probability of many of the specific scenarios ever materializing. Repeated official warnings of pending attacks and periodic—and at times frequent—changes in the ill-conceived and ill-executed official color-coded

and Probability' (1973) 5 *Cognitive Psychology* 207; Amos Tversky & Daniel Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases', in *Judgment Under Uncertainty: Heuristics and Biases* (Daniel Kahneman et al. eds., 1982) 3 at 11.

[26] The flip side is that unavailability might lead to underestimation, and as a result also underreaction. This may have accounted to the intelligence failure in foiling the attacks of September 11 and comprehending the true nature of the risk. See, e.g., Cass R. Sunstein, 'On the Divergent American Reactions to Terrorism and Climate Change' (2007) 107 *Columbia L. Rev.* 503 at 535; Max H. Bazerman & Michael D. Watkins, *Predictable Surprises* (2004) at 15–41; Noll and Krier, 'Some Implications of Cognitive Psychology for Risk Regulation', p. 351 ("while availability may account for overreaction to a catastrophe, anchoring may explain underreaction. As yet, the [cognitive] theory [of choice under uncertainty] cannot tell us very much about which mistakes are likely to occur in any given circumstance."). Another potential cause of underreaction is people's "belief that good things are more likely than average to happen to us and bad things are less likely than average to happen to us." Korobkin & Ulen, 'Removing the Rationality Assumption', p. 1091.

[27] Plous, *The Psychology of Judgment and Decision Making*, p. 126.

[28] Tversky & Kahneman, *Judgment Under Uncertainty*, p. 11.

terror alert level,[29] and the prominence of the wars in Afghanistan and Iraq in the public's mind, have further fed the terrorism frenzy, increasing the imaginability of various potential hazards and hence their perceived riskiness and the concomitant sense of individual and national insecurity. Individuals tend to overestimate the likelihood of dramatic events that attract significant media coverage and attention and underestimate the risks of "mundane" events that are, in fact, more—perhaps even much more—likely. For example, studies have demonstrated that even prior to the terrorist attacks on 9/11, individuals were ready to pay higher premiums to obtain flight insurance for death due to (imaginable) "terrorist acts" then to obtain flight insurance covering death resulting from (more abstract) "all possible causes.[30] That being the case, we can expect greater attention and public pressure, and consequently more resources, to be directed at controlling, minimizing, insuring against, or preventing (to the extent possible) the former.[31] Overestimation of the likelihood of such risks would also mean that when put on the balancing scales and be

[29] George Loewenstein & Ted O'Donoghue, '"We Can do this the Easy Way or the Hard Way": Negative Emotions, Self-Regulation, and the Law' (2006) 73 *U. Chicago L. Rev.* 183 at 201 (arguing that the color-coded terrorist alert system "that provides no guidance about what to do, but terrifies the population, is a perfect example of government policies that impose almost pure deadweight losses."); Philip G. Zimbardo, 'The Political Psychology of Terrorist Alarms' (2003) (available at http://www.apa.org/about/division/terrorism.html); J.N. Shapiro & D.K. Cohen, 'Color blind: Lessons from the failed homeland security advisory system' (2007) 32 *International Security* 121; John Paul & Sangyoub Park, 'With the Best of Intentions: The Color Coded Homeland Security Advisory System and the Law of Unintended Consequences' (2009) 4(2) *Research and Practice in Social Sciences* 1.

[30] George F. Loewenstein et al., 'Risk as Feelings" (2001) 127 *Psychological Bulletin* 267 at 275. This anomaly can be partly (but only partly) explained by the existence of an embedding effect: whether you ask about one risk or a larger category in which it is embedded, you get the same result. W. Kip Viscusi & Richard J. Zeckhauser, 'Sacrificing Civil Liberties to Reduce Terrorism Risk' (2003) 26 *J. of Risk and Uncertainty* 99 at 113. In the example above, however, the issue was not one of embedding but rather the difference between a concrete (and therefore imaginable) threat and a more abstract category of possible threats.

[31] Paul Slovic, 'What's Fear Got to Do with It? It's Affect We Need to Worry About' (2004) 69 *Missouri L. Rev.* 971 at 984–89 [hereinafter 'The Affect Heuristic'] (Difficult balance between alerting and informing people about serious risks—allowing for analytical assessment of the risks involved—and creating exaggerated fears as a result of assessing such risks emotionally and affectively).

compared to other, competing, interests, we are likely to perceive such risks as weighing the scales down more than they actually ought to.

* * *

Prospect theory and *probability neglect* suggest that individuals tend to give excessive weight to low-probability results when the stakes are high enough and the outcomes are particularly bad (or, in fact, particularly good).[32] In cases of high-magnitude, low-probability risks, attention is directed almost exclusively to outcomes rather than to the likelihood of such outcomes materializing. Terrorist threats are particularly challenging in this regard. According to Paul Slovic, individuals perceive risks as more "serious", the more "dreaded" and "unknown" they are. The problem is that "as risks become increasingly dreaded and unknown, people demand that something be done about them regardless of the probability of their occurrence, the costs of avoiding the risk, or the benefits of declining to avoid the risk."[33] A risk is "dreaded" if people perceive it to be involuntary and potentially catastrophic, and one over which they lack control. It is "unknown" if it is new and not well understood, among other things. Terrorist attacks are "dreaded" risks and as such are considered to be of an especially serious nature.[34] At the same time, the range of "modern" terrorist threats creates what Kai Erikson calls a "new species of trouble," that makes analytical risk assessment extremely difficult and increases our reliance on affective assessment.[35]

[32] Daniel Kahneman & Amos Tversky, 'Prospect Theory: An Analysis of Decision Under Risk', in Daniel Kahneman & Amos Tversky (eds.), *Choices, Values, and Frames* (2001) 17; Slovic, 'The Affect Heuristic', pp. 982–83.

[33] Christina E. Wells, 'Questioning Deference' (2004) 69 *Missouri L. Rev.* 903 at 925.

[34] Paul Slovic, *The Perception of Risk* (2000) 220–31; Slovic, 'The Affect Heuristic', pp. 985–86.

[35] Kai Erikson, *A New Species of Trouble: Explorations in Disaster, Trauma, and Community* (1994); Slovic, 'The Affect Heuristic', p. 985; Viscusi & Zeckhauser, 'Sacrificing Civil Liberties', p. 101 ("Terrorism presents a situation of tremendous uncertainty, or perhaps a better phrase is 'ignorance' … Given this, attempts to estimate terrorism risks will fall prey to some of the more salient biases and anomalies that have been identified in the risk and uncertainty literature."). The fact that such unknown risks create stronger emotional responses does not contradict the availability heuristic. As Masur correctly observes, individuals "react most strongly to threats that have been much discussed within the press but that are sufficiently complex or 'scientific' that the average layperson cannot comprehend them." Masur, 'Probability Thresholds', pp. 1341–42.

In the context of high-magnitude, low-probability risks, individuals often demonstrate probability neglect, i.e., the failure to assess at all the probability that a certain scenario will materialize, but instead focus exclusively on the worst possible outcome—the worst-case scenario. This has been famously captured by former Vice President Dick Cheney's statement that "If there's a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response."[36] Such predictions are especially potent—and at the same time likely to be biased—when the expected outcome is "affect rich," as when it involves not merely a serious loss, but one that produces particularly strong emotions.[37]

Individuals also entertain myopic perspectives about the future in that they tend to undervalue and discount future benefits and costs when comparing them with present benefits and costs. While a strong governmental response against terrorism is perceived by the public as socially beneficial, the longer-term costs to individual rights and liberties tend to be overly discounted.[38] That such future costs seem mostly intangible and abstract, especially in comparison with the very tangible sense of fear for one's person and loved ones, coupled with a feeling of increased security as a result of governmental action and a sense that government's infringements on civil liberties target "others" (as discussed below), only exacerbate this facet of our risk assessment.[39] One should note that such myopia might seem to be counter-balanced by what is known as "optimism bias": studies have shown repeatedly that people are often overly optimistic about the likelihood of positive outcomes of future actions and often underestimate the likelihood of negative effects of such actions. However, Slovic notes that one exception to the optimism bias concerns terrorism threats, which seem to make every member of the target community feel vulnerable.[40]

[36] Quoted in Ron Suskind, *The One Percent Doctrine* (2006) at 61–62.

[37] Cass R. Sunstein, 'Probability Neglect: Emotions, Worst Cases, and Law' (2002) 112 *Yale L.J.* 61 at 66; Cass R. Sunstein, 'The Laws of Fear' (2002) 115 *Harv. L. Rev.* 1119 at 1137–44; Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (2005).

[38] See also Sunstein, 'Terrorism and Climate Change', pp. 527–28, 531–32 (noting that "[w]hen the costs are placed squarely 'on screen,' people begin to weigh both costs and benefits, and their enthusiasm for regulatory expenditures diminishes." *Id.*, p. 528).

[39] Sunstein, 'Terrorism and Climate Change', pp. 524–29.

[40] Slovic, 'The Affect Heuristic', p. 986.

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Cognitive theory of decision-making under conditions of uncertainty suggests that the systematic biases identified above are not unique to decision-making in times of violent crises. However, as already noted, exigencies tend to exacerbate such systematic challenges. There are additional features of dealing with violent crises that are likely to aggravate further these difficulties.

Few situations can solidify broad national consensus behind the government. Times of crisis and emergency can and do. James Madison noted that constitutions originated in the midst of great danger that led to "an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions."[41] Moved by perceptions of substantial physical threat, motivated by growing personal fear of being the next victim and by hatred toward the terrorists, and frustrated by the continuance of terrorist activities, the public is likely to "rally 'round the flag."[42] Consensus may, in turn, result in *group polarization* on both the level of the public at large as well as of distinct groups of experts: "When like-minded people deliberate with one another, they typically end up accepting a more extreme version of the views with which they began."[43] Of the various explanations for group polarization, four are of special significance in our context, namely emotional contagion, social interactions, over-confidence, and "groupthink."[44]

[41] *The Federalist No. 49* (James Madison) (Clinton Rossiter ed., 1961), p. 315; Karl R. Popper, *The Open Society and Its Enemies* (5th ed. 1971) vol. 1, pp. 43, 198; E.L. Quarantelli & Russell R. Dynes, 'Community Conflict: Its Absence and Its Presence in Natural Disasters' (1976) 1 *Mass Emergencies* 139 at 140, 145 (noting that emergency periods are characterized by an absence of conflict, as conflict is deemed dysfunctional for the maintenance or survival of the relevant social system); Eugene V. Rostow, '*The Japanese American Cases—a Disaster*', (1945) 54 *Yale L.J.* 489, 490–91.

[42] Bruce Russett, *Controlling the Sword: The Democratic Governance of National Security* (1990) 34 (describing the "rally 'round the flag effect" as the phenomenon by which "a short, low-cost military measure to repel an attack … is almost invariably popular at least at its inception. So too are many other kinds of assertive action or speech in foreign policy."); Gad Barzilai, *A Democracy in Wartime: Conflict and Consensus in Israel* (1992) 248–60.

[43] Cass R. Sunstein, *Why Societies Need Dissent* (2003) 111–35. See also Cass R. Sunstein & Reid Hastie, 'Four Failures of Deliberating Groups' (April 2008) (available online at http://ssrn.com/abstract=1121400).

[44] Sunstein, *Laws of Fear*, pp. 100–01.

Strong emotions such as fear, hysteria, panic, outrage, and xenophobia are invoked by violent emergencies. Such emotions carry a pronounced effect on people's perceptions of, and reactions to, risk as they act as multipliers of (perceived) likelihood of risk.[45] That effect is then amplified and re-amplified as a result of emotional contagion. Individuals are highly responsive to emotions expressed by others. Moreover, some emotions, such as fear, are particularly contagious. People also shape their opinions (particularly their expressed opinions) and adjust them so as to be in sync with the dominant position within the relevant reference group since they like to "belong" and to be favorably perceived and counted by others.[46] This is especially so the less people feel that they know about a certain issue; they would tend then to rely on the judgments of those "in the know." Decision-making that takes place under conditions of uncertainty is particularly prone to suffer from distortions that result from the interplay of informational and reputational influences and cascades.

"In an informational cascade," writes Cass Sunstein, "people cease relying … on their private information or opinions. They decide instead on the basis of the signals conveyed by others … It follows that the behavior of the first few people can, in theory, produce similar behavior from countless followers."[47] Matters of national security almost always present significant information asymmetries among the various branches of government and between the government and the public and are thus especially prone to the effects of informational cascades. Informational cascades may also partially explain the tendency of "civilians"—including not merely the public at large but also the judicial and legislative branches of government as well as individuals within the executive branch—to defer to the judgment of military experts in such matters.[48] Informational and reputational cascades may, in fact, be manipulated by availability entrepreneurs who have particular stake in the outcomes of the policy making process and seek to shape and influence public dis-

[45] Sunstein, 'Terrorism and Climate Change', pp. 544–45; Peter Sandman, 'Hazard Versus Outrage in the Public Perception of Risk', in *Effective Risk Communication: The Role and Responsibility of Government and Nongovernment Organizations* (Vincent T. Covello et al. Eds., 1989) 45 ("outrage model").

[46] For discussion of "reputational cascade" see Sunstein, *Why Societies Need Dissent,* pp. 74–95.

[47] Sunstein, *Why Societies Need Dissent*, p. 55.

[48] See, e.g., Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 *Yale L.J.* 1011 at 1034.

course so as to control the policy selection process.[49] In the context of national security issues the military-industrial complex may fulfill such a role.[50] Such interest groups, seeking to influence national policy towards increased spending on defense and national security and according greater weight to national security concerns in setting national priorities, enjoy the benefits of possessing and controlling specialized information and expertise about potential national security risks and of being highly organized. This may not only lead other institutions, such as the courts, to accord a significant margin of appreciation and deference to the judgments of national security entrepreneurs, but it may also mold the general public's perception of the risks that terrorists, wars or emergencies present to the nation.[51] Thus, if availability entrepreneurs acting in the area of national security present certain risks as highly likely to occur (or of special magnitude) their position is likely to influence greatly decision-makers and the public at large. Moreover, the combination of emotional contagion and consensus leading to the prioritization of a "dominant position" will increase the ability of availability entrepreneurs to shape and influence public opinion and policy-making through reputational cascades when "people think they know what is right, or what is likely to be right, but they nonetheless go along with the crowd in order to maintain the good opinion of others."[52]

In seeking to manipulate public opinion and decision-making, the framing of the relevant issues is critical. Policy choices are frequently shaped more by the framing of outcomes than by the substance of the issues at stake. Thus, in order to increase public support for its actions, the government (and particularly the executive branch) may seek to manipulate information pertaining both to the magnitude and probability of

[49] Timur Kuran & Cass R. Sunstein, 'Availability Cascades and Risk Regulation' (1999) 51 *Stanford Law Review* 683 at 727; Sunstein, 'Terrorism and Climate Change', p. 539. See also Molly J. Walker Wilson & Megan P. Fuchs, 'Publicity, Pressure, and Environmental Legislation: The Untold Story of Availability Campaigns' (2009) 30 *Cardozo L. Rev.* 2147.

[50] Dwight D. Eisenhower, Farewell Address (Jan. 17, 1961), available at <http://www.eisenhower.utexas.edu/farewell.htm>. See also Jon D. Hanson & Douglas A. Kysar, 'Taking Behavioralism Seriously: The Problem of Market Manipulation' (1999) 74 *N.Y.U. L. Rev.* 630 at 722–43; Jon D. Hanson & Douglas A. Kysar, 'Taking Behavioralism Seriously: Some Evidence of Market Manipulation' (1999) 112 *Harvard L. Rev.* 1420.

[51] Sunstein, *Why Societies Need Dissent*, pp. 54–95.

[52] Sunstein & Hastie, 'Four Failures of Deliberating Groups', pp. 15–17.

potential risks or to the costs and benefits of pursuing different measures in response to such risks.[53]

As noted above, national security related risks, in general, and high-magnitude, low-probability threats, in particular, are especially susceptible to governmental "probability inflation"[54] since they involve acute informational asymmetries between the Executive and other government branches and the public, resulting in greater deference towards the Executive.[55] Another type of framing takes place when events are characterized in different ways, invoking a potentially different set of parameters of response. It may well be that framing the events of September 11, using the language and rhetoric of "war" led to different responses to the threats than would have been the case had the events and the threat from al Qaeda been captured through the language of crimes and criminal law.[56] This is also linked to the phenomenon of "anchoring." Amos Tversky and Daniel Kahneman demonstrated that the first number with which a decision-maker is presented has a demonstrable effect on that person's ultimate choice. That first number becomes the anchor to which all future assessments are then tied. It strongly influences the ultimate decision in so far as it would be taken as the starting point from which certain adjustments can be made.[57] In our context it may be said that anchoring the events of September 11th in the context of "war" has greatly shaped and influenced the responses to such events.

[53] *See*, *e.g.*, Richard L. Hasen, 'Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules' (1990) 38 *UCLA L. Rev.* 391; Michael Stohl, *War and Domestic Political Violence: The American Capacity for Repression and* Reaction (1976) 82–95; Paul Slovic et al., 'Facts Versus Fears: Understanding Perceived Risk', in *Judgment Under Uncertainty: Heuristics and Biases*, p. 483; Slovic, 'The Affect Heuristic', p. 981. See also George Loewenstein & Jane Mather, 'Dynamic Processes in Risk Perception' (1990) 3 *J. Risk & Uncertainty* 155 at 161–65.

[54] Masur, 'Probability Thresholds', p. 1325.

[55] *Id*. p. 1329. Masur notes that "High-magnitude harms are national-security-implicating harms, and national-security-implicating harms are the province of the executive." *Id*. p. 1330.

[56] *See*, *e.g.*, Elaine Tyler May, 'Echoes of the Cold War: The Aftermath of September 11 at Home' in Mary L. Dudziak (ed.), *September 11 in History: A Watershed Moment?* (2003) 35.

[57] Amos Tversky and Daniel Kahneman, 'Framing of Decisions and the Psychology of Choice' (1974) 211 *Science* 453 at 457–58; Plous, *The Psychology of Judgment and Decision Making*, p. 146.

At the same time, the more confident "trusted" officials are in the correctness of their own assessments, that might, in and of itself, breed more radical responses to the perceived threats. As Sunstein suggests, "people with extreme views tend to have more confidence that they are right, and … as people gain confidence, they become more extreme in their beliefs."[58] Once again, the significant asymmetries in information between the experts and everyone else may contribute further to such confidence by the "experts" in the correctness of their positions. Overconfidence is often buttressed by notions of self-fulfilling prophecies and the observable tendency to prefer information that is consistent with one's previously held views, or to interpret information in ways that confirm those views.[59] This may also account for an attitude of suspicion and even disregard towards divergent positions that are advocated by "civilians." At the same time, the phenomenon of "Monday morning quarterbacking" (known in scholarly circles as the "hindsight bias") means that people tend to believe that they knew and assessed correctly all along a particular risk and its probability, even though the risk was completely unanticipated.[60] The problem is that if people, in hindsight, believe that the risk was more foreseeable and still occurred that might be interpreted to mean that not enough measures had been taken in order to prevent the harm from taking place. That may lead "experts" whose professional reputations depend on their ability to anticipate threats and foil them to claim that the only reason for the failure to prevent the threat from materializing must be that they (i.e., the nation) were forced to fight the threats "with one hand tied behind their back" and to put the blame for the failure to act on those who are castigated as "soft on terrorism." This may also contribute to the adoption of even more draconian counterterrorism measures today then would have otherwise been justified by the circumstances.

Finally, group polarization is even more probable in circumstances that are likely to result in groupthink, i.e., a "mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when

[58] Sunstein, *Laws of Fear*, p. 100. See also Jeffrey J. Rachlinski, 'The Uncertain Psychological Case for Paternalism' (2003) 97 *Northwestern U. L. Rev.* 1165 at 1172–73.

[59] Paul Horwitz, 'Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment' (2003) 76 Temple L. Rev. 1 at 17; Plous, *The Psychology of Judgment and Decision Making*, pp. 231–34.

[60] See, e.g., Chris Guthrie et al., 'Inside the Judicial Mind' (2001) 86 *Cornell L. Rev.* 777 at 799–803.

the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action."[61] Groupthink is more likely when groups are insulated from outside influence, are relatively homogeneous, lack an impartial leader and systematic procedures for evaluating evidence and make decisions in times of great stress.[62]

The fact that violent crises breed very strong emotions, and that those emotions are particularly subject to emotional contagion, increases the danger of bias and distortions in another important way. Cognitive theory researchers have developed theories of thinking, knowing, and information processing that are known as "dual-process" theories. One such theory argues that emotions are part of "System I reasoning" (that Slovic calls "the experiential system"), which is "fast, automatic, effortless, associative, and often emotionally charged," as contrasted with "System II reasoning" ("the analytic system"), which is "slower, serial, effortful, and deliberately controlled."[63] As such, system I, which incorporates heuristic-based reasoning, is deemed more error-prone than system II.[64] Although system II is linked to analytical, logical reasoning, and system I is mostly affective, both systems may well be rational and serve different functions.[65] According to theory, affective responses to, and the use of cognitive heuristics to deal with, situations, actions or other individuals, i.e., responses that belong in System I happen rapidly and automatically.[66] Not only are such affective responses our first reactions, but they also guide information processing and judgment by the analytic system—system II—and serve as an orienting mechanism for the deliberative processes that take place in system II.[67] To the extent that violent crises invoke strong, even extreme emotional responses that are likely to be amplified throughout society and groups of decision-makers, it seems reasonable to assume that whatever biases and errors that taint system I, would carry over and distort our

[61] Irving L. Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes* (1982) 9

[62] *Id*. pp. 242–59; Wells, 'Questioning Deference', pp. 927–28.

[63] Daniel Kahnman, 'Maps of Bounded Rationality: Psychology for Behavioral Economics' (2003) 93 *Am. Econ. Rev.* 1449 at 1451; Paul Slovic, 'What's Fear Got to Do with It? It's Affect We Need to Worry About' (2004) 69 *Missouri L. Rev.* 971 at 972.

[64] Sunstein, 'Terrorism and Climate Change', pp. 522–23.

[65] One need only consider the role played by instinct and intuition in the struggle for survival.

[66] Slovic, 'The Affect Heuristic', p. 971.

[67] *Id*. pp. 974–75.

long-term deliberative capacity.[68] Furthermore, once opinions about the risk of future terrorist attacks are formed (even if somewhat tentatively at first), decision-makers, and the public at large, are likely to seek evidence that will further confirm their initial assessments and to reject and exclude relevant evidence that may contradict such assessments. This leads to further entrenchment of mistakes.[69]

* * *

The biases mentioned above suggest that under extreme circumstances governmental overreaction against terrorist and other violent threats is a likely outcome. This conclusion is buttressed further by prevalent characterizations of violent emergencies in dichotomized and mutually exclusive "us versus them" terms.[70] The contours of conflict are drawn around groups and communities rather than individuals. Such distinctions need not be taken as given; counterterrorism measures often actively produce and construct a suspect community.[71] What is critical, though, is the identification of such a community of "others." In times of crisis the dialectic of "us versus them" serves several functions. It allows people to vent fear and anger in the face of actual or perceived danger, and direct negative emotional energies toward groups or individuals clearly identified as different.[72] The same theme also accounts for the greater willingness to confer emergency powers on the government when the "other" is well-defined and clearly separable from the members of the community.[73] The

[68] Lowenstein et al., 'Risk as Feelings', pp. 275–76.

[69] Max Bazerman, *Judgment in Managerial Decision Making* (1998) 35. See also, Ian S. Lustick, *Trapped in the War on Terror* (2006).

[70] See Oren Gross & Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006) 220–27.

[71] Paddy Hillyard, *Suspect Community: People's Experience of Prevention of Terrorism Acts in Britain* (1993) 257; Leti Volpp, 'The Citizen and the Terrorist' in Mary L. Dudziak (ed.), *September 11 in History: A Watershed Moment?* (2003) 147.

[72] Sunstein, 'Terrorism and Climate Change', pp. 542–44 (discussing what he calls the "Goldstein Effect," i.e., "the ability to intensify public concern by giving a definite face to the adversary, specifying a human source of the underlying threat and a person to be blamed for it … people are especially likely to respond to an identifiable perpetrator—just as they are especially likely to respond to an identifiable victim.").

[73] W.A. Elliott, *Us and Them: A Study of Group Consciousness* (1986) 9; Vincent Blasi, 'The Pathological Perspective and the First Amendment' (1985) 85 *Columbia L. Rev.* 449 at 457; David Cole, 'Enemy Aliens' (2002) 54 *Stanford L. Rev.* 953 at 955; Oren Gross,

fact that the targets of emergency and counter-terrorism measures are perceived as outsiders, frequently foreign ones, has important implications when communities set out to strike a proper balance between liberty and security in times of crisis. The clearer the distinction between "us" and "them" and the greater the threats "they" pose to "us," the greater in scope the powers assumed by government and tolerated by the public become. Balancing takes place not between security and liberty as such, but rather between *our* security and *their* liberty.[74]

Targeting outsiders is likely to incur little political cost for decision-makers. It may even prove to be politically expedient: While the benefits (perceived or real) of fighting terrorism and violence accrue to all members of society, the costs of such actions seem to be borne disproportionately (even exclusively) by a distinct and ostensibly well-defined group of people. Moreover, inasmuch as violent emergencies may lead to the targeting of "foreigners," those targeted may lack the most basic of requirements for a meaningful political leverage—the right to vote political officials out of office.

Times of great danger (real or perceived) have brought about a confluence of two mutually reinforcing trends, namely the tendency of the public to fear and hysteria, and nativistic tendencies. In his seminal study, *Strangers in the Land*, John Higham analyzes the phenomenon of American Nativism, which he defines as "intense opposition to an internal minority on the ground of its foreign (i.e., 'un-American') connections."[75] Higham finds patterns of nativistic attitudes throughout American history, focusing, in particular, on anti-Catholicism, anti-radicalism, and racial nativism. Yet, he also notes that "nativism usually rises and falls in some relation to other intense kinds of national feeling."[76] Intense moments, such as

'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 *Yale Law Journal* 1011 at 1082–85; Ileana M. Porras, 'On Terrorism: Reflections on Violence and the Outlaw' (1994) *Utah L. Rev.* 119; Natsu Taylor Saito, 'Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States' (1998) 1 *Yale Hum. Rts. and Development L. J.* 53 at 57–59; Leti Volpp, 'The Citizen and the Terrorist' (2002) 49 *UCLA L. Rev.* 1575.

[74] David Cole, *Enemy Aliens* (2003) 4–5. Compare with Sunstein, 'Terrorism and Climate Change', pp. 529–30 (discussing the perception that tackling climate change would involve "American costs" and "Foreign benefits.").

[75] John Higham, *Strangers in the Land: Patterns of American Nativism*, 1860–1925 (1983) 4.

[76] *Id.*, p. 4.

the Haymarket Affair of May 1886,[77] while not creating nativism, certainly flared up such emotions and attitudes and led to the intensification and polarization of pre-existing nativistic sentiments. Violent emergencies tend to result in situations where the cost bearers are sufficiently few and powerless, or have certain substantial (perhaps even insurmountable) barriers to their coalescing to fight the government's actions.[78] Under such circumstances, the danger is that political leaders will tend to strike a balance disproportionately in favor of security and impose too much of a cost on the target group without facing much resistance (and, in fact, receiving strong support) from the general public.[79]

Research has demonstrated that when people contemplate their mortality they tend to punish or judge more harshly those who violate—or are at least perceived to violate—deeply held cultural values.[80] The specter of our own mortality tends to lead us to make decisions that reinforce deeply held cultural values. To the extent that "foreign" connotes that which is not part of our group cultural identity and is even perceived to threaten it, it is not hard to see why, in the context of terrorist threats, "foreign" will be particularly targeted.[81]

The stigma of foreignness is not limited to the distinction of citizenship. "Outsiders" need not necessarily be (although they primarily

[77] *Id.*, pp. 52–63.

[78] William J. Stuntz, 'Local Policing After the Terror' (2002) 111 *Yale L. J.* 2137 at 2165.

[79] Blasi, 'The Pathological Perspective', p. 457; Juan E. Méndez, 'Human Rights Policy in the Age of Terrorism' (2002) 46 *St. Louis U. L. J.* 377 at 383; Stuntz, 'Local Policing', p. 2165; Volpp, 'Citizen and Terrorist', pp. 1576–77; Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (2004) 545; Henry P. Monaghan, 'The Protective Power of the Presidency' (1993) 93 *Columbia L. Rev.* 1 at 26.

[80] Jeffrey J. Rachlinski et al., 'Inside the Bankruptcy Judge's Mind' (2006) 86 *Boston U. L. Rev.* 1227 at 1256. Rachlinski, Guthrie and Wistrich suggest that mortality salience has more influence on an individual's decision making when she is forced to contemplate her personal mortality rather than mortality in the abstract. Terrorist threats, as noted above, often lead to a strong sense of personal insecurity and fear of death or serious harm befalling oneself or loved ones.

[81] Rachlinski et al., 'Inside the Bankruptcy Judge's Mind', pp. 1250–52 (discussing the "mortality salience" hypothesis). See also Kenneth L. Karst, 'Threats and Meanings: How the Facts Govern First Amendment Doctrine' (2006) 58 *Stanford L. Rev.* 1337 at 1342–43 (noting that lethal threats, such as the ones invoked by terrorism, trigger not only short-term fear but also long-term anxiety that may continue to preoccupy the person who was targeted long after the initial life-threatening shock).

are) non-citizens. Crises tend to lead to focus on identity and solidarity, rather than the formal legal characteristics of citizenship.[82] Citizens who are somehow identified with the enemy are also seen as outsiders, as the internment of American citizens (together with non-citizens) of Japanese ancestry during World War II demonstrated. "Foreign" connotes, therefore, anything that threatens the "American way of life."[83] The links to things and influences from abroad can then be easily made.[84] Race, religion, and eventually ideas and beliefs and associations can, and have been, described as "foreign," mobilizing significant popular forces against particular groups. As William Wiecek notes: "Since the early nineteenth century, Americans have nurtured a consistent fear that alien ideologies, as well as the foreigners who were thought to be their vectors, were invading the pristine American republic."[85]

Whether drawn along citizenship, ethnic origin, race, or religion, a sense of clear distinction between "us" and "them" facilitates pushing the emergency powers' envelope. A bright-line separation between "us" and "them" allows for piercing the Rawlsian veil of ignorance.[86] We allow for more repressive emergency measures when we believe that we are able to peek beyond the veil and ascertain that such powers will not be turned against us. The portrayal of the sources of danger as "foreign" and terrorists as "others" who are endowed with barbaric characteristics and who are out to destroy us and our way of life is used further to prove the urgent need for radical measures to meet the threat head on.[87]

While the distinction between us and them is not unique to the sphere of emergency powers crises lead to heightened individual and group consciousnesses. Allegiance to the community and the willingness to sacrifice for the community's sake—in certain situations, the willingness to make

[82] Volpp, 'Citizen and Terrorist', p. 156; Linda Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana J. of Global Legal Stud.* 447; Christina E. Wells, 'Fear and Loathing in Constitutional Decision-Making' (2005) *Wisconsin L. Rev.* 115.

[83] See, e.g., Rupert Brown, *Prejudice: Its Social Psychology* (1995) (discussing threats to a group's social identity).

[84] Wells, 'Questioning Deference', pp. 909–21.

[85] William M. Wiecek, 'The Legal Foundations of Domestic AntiCommunism: The Background of Dennis v United States' (2001) *Supreme Ct. Rev.* 375 at 381.

[86] John Rawls, *A Theory of Justice* (1999) 102–07.

[87] Porras, 'Violence and the Outlaw', pp. 121–22. See also Deborah A. Small & George Loewenstein, 'The Devil You Know: The Effects of Identifiability on Punishment' (2005) 18 *J. Behavioral Decision Making* 311 at 315–16.

the ultimate sacrifice of one's own life—receive a higher premium and attention in times of peril that endanger the group. The lines of ins and outs are more clearly and readily drawn.[88] Stereotyping is often employed with respect both to insiders and to outsiders, emphasizing good, noble, and worthy attributes of the former, and negative traits of the latter. Collective derogatory name-calling and identification of the others as "barbarians" are symptoms of that trend.[89] Internal conformities within the community are exaggerated, while divergence from "outsiders" is emphasized.[90]

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Cognitive theory of decision-making raises significant concerns about balancing tests and their outcomes, in general, and in the context of violent crises, in particular. After identifying and recognizing the biases and distortions noted above, two general inquiries ought to be followed in order to examine whether the effects of these biases might be moderated, mitigated, or prevented. The first inquiry pertains to institutional questions, i.e., whether some institutions (such as the courts, the legislature or the executive branch of government) may be better suited than others to engage in balancing acts in as much as they are less prone to suffer from these cognitive biases.[91] The second inquiry is whether any changes should be, and in fact could be, made in the utilization of balancing tests in order to achieve results out of the balancing process that are less affected by distortions. It is to this second inquiry that I now turn briefly by looking at some corrective mechanisms that have been used in the context of First Amendment jurisprudence in the United States.

[88] Frederick Schauer, 'Community, Citizenship, and the Search for National Identity' (1986) 84 *Michigan L. Rev.* 1504; Quarantelli & Dynes, 'Community Conflict', pp. 143–44.

[89] Elliott, *Us and Them*, p. 9; J. Glenn Gray, *The Warriors: Reflections on Men in Battle* (1973) 157–202; Jon Hanson & David Yosifon, 'The Situational Character: A Critical Realist Perspective on the Human Animal' (2004) 93 *Georgetown L.J.* 1 at 55–57.

[90] Elliott, *Us and Them*, p. 9.

[91] On the significance of the "institutional" question see, for example, Cass Sunstein, 'Behavioral Law and Economics: A Progress Report' 1 *Am. L. & Econ. Rev.* (1999) 115 at 146; Samuel Issacharoff, 'Behavioral Decision Theory in the Court of Public Law' 87 *Cornell L. Rev.* (2002) 671 at 671–72.

One such mechanism that courts have been using in order to minimize the distortions that emerge when dealing with high-magnitude, low-probability risks are "probability thresholds" that enable the courts to focus on issues of likelihood and probability rather than on potential magnitude of harm.[92] Probability thresholds set a lower boundary on how likely a potential harm must be in order for that harm to register in the constitutional calculus, i.e., be accounted for in any subsequent act of constitutional balancing, regardless of the harm's magnitude. The use of such thresholds prevents balancing from taking place unless the probability of the asserted harm crosses a certain threshold. Regardless of the projected magnitude of the particular harm, if its occurrence is so unlikely as to not clear the threshold, First Amendment doctrine "instructs courts to refuse to weigh the expected harm from the event against the benefits that the speech in question is likely to produce."[93] As a result, low-probability harms are eliminated from consideration, and balancing will not take place, no matter how great their magnitude might be.

Yet, even when a particular potential harm does cross the probability threshold, other mechanisms may be used to mitigate the harmful consequences of cognitive biases. Analyzing First Amendment jurisprudence through the prism of risk analysis,[94] it has been suggested that one major reason for the surprising fact that "in the United States, at least, the freedom of expression has gone largely untouched" by and during the war on terror is that "the First Amendment safeguards for political speech that may incite violence or impede war efforts have been ratcheted so high that a successful conviction for such speech is almost impossible to obtain."[95] The claim is that First Amendment case law has developed in that direction so as to recognize and guard "against the predictable shortcomings in our ability to perform accurate risk analysis."[96]

Others have been less sanguine about the ability of doctrinal formulas to protect effectively civil liberties in times of acute crisis and argued that no true balancing test—no matter how strict the judicial review may be and how compelling the interests involved are—may ever be robust enough to not become meaningless in such perilous times. While not

[92] Masur, 'Probability Thresholds'.
[93] *Id.* p. 1297.
[94] Horwitz, 'Free Speech as Risk Analysis', pp. 27–49.
[95] *Id.* pp. 2, 7.
[96] *Id.* p. 8.

rejecting the potential usefulness of doctrinal standards, Vincent Blasi seems to put greater trust in the efficacy of "mechanistic measures" that confine the range of discretion that is left to future decision-makers over standards that require in their application that are more susceptible to distortions that would result in less speech protective outcomes under intense pressure.[97] In order to prepare for such intense pressures, he argues for the adoption of "pathological perspective" in adjudicating First Amendment disputes and fashioning First Amendment doctrines. He suggests that such an approach is necessary in light of governmental proclivity to violate the rights that are protected by the First Amendment in times of crisis.[98] Courts are called upon to make "a conscious effort … to strengthen the central norms of the First Amendment against the advent of pathology."[99] Emphasis ought to be put "in adjudication during normal times on the development of procedures and institutional structures that are relatively immune from the pressure of urgency by virtue of their formality, rigidity, built-in delays, or strong internal dynamics."[100]

These attempts at curbing and moderating the pernicious effects of bias through institutional and doctrinal mechanisms operate as precommitments that are designed to limit, ex ante, our ability to engage in cognitively fraught act of balancing of constitutional rights against overestimated possibilities of harm.[101]

[97] Blasi, 'The Pathological Perspective', pp. 474–80. See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 109–16.

[98] Blasi, 'The Pathological Perspective', p. 450 ("'Pathology' … is a social phenomenon, characterized by a notable shift in attitudes regarding the tolerance of unorthodox ideas. What makes a period pathological is the existence of certain dynamics that radically increase the likelihood that people who hold unorthodox views will be punished for what they say or believe.").

[99] *Id*. p. 459.

[100] *Ibid*. p. 468. Blasi advocates a "keep it simple" guideline, i.e., judges should use simple First Amendment principles in order to strengthen the restraining power of the First Amendment in times of crisis. *Ibid*. pp. 466–76. Blasi suggests viewing the First Amendment as concentrating on core values that are more easily defensible in repressive times. *Ibid*. pp. 476–80.

[101] Horwitz, 'Free Speech as Risk Analysis', p. 66. See also Sanford Levinson, "Precommitment' and 'Postcommitment': The Ban on Torture in the Wake of September 11' (2003) 81 *Texas L. Rev.* 2013; Steven R. Ratner, 'Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint' (2004) 5 *Theoretical Inquiries in Law* 81; Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (rev. ed. 1984); Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (1995); Note, 'War, Schemas, and Legitimation: Analyzing

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Cognitive theory of decision-making under conditions of uncertainty suggests that balancing processes, in general, and those seeking to balance such interests as liberty and security, in particular, are likely to suffer from identifiable biases. Its insights indicate that the outcomes of such delicate and complex balancing acts are likely to be distorted and thus sub-optimal. While the theory does not, necessarily, make claims as to what the equilibrium between the competing interests ought to be at any given context[102]—for example, it does not seek to determine what an acceptable level of risk from terrorist attacks ought to be—it does suggest that once such a decision is made, the analysis that decision-makers perform in particular cases and in adopting specific counter-measures is likely to be significantly flawed. Perhaps even more importantly, it suggests that such flaws are systematic and that they are going to be tilted in one direction—i.e., towards more security—than the other, i.e., more liberty.

the National Discourse about War' (2006) 119 *Harvard L. Rev.* 2099 at 2118–20 (advocating binding precommitments about what would be acceptable justifications for war, in order to safeguard against "potentially biasing heuristics").

[102] As Aharon Barak, the former President of the Israeli Supreme Court, notes: "The balancing point between the conflicting values and principles is not fixed. It differs from case to case and from issue to issue. The damage to national security caused by a given terrorist and the nation's response to the act affects the way in which the freedom and dignity of the individual are protected." Aharon Barak, 'The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism' (2003) 58 *U. of Miami L. Rev.* 125 at 135; Barak, 'A Judge on Judging', pp. 93–97.

Appendix: Exchange Program Participation, 1982–2009*

Since the early 1980s, the Minnesota-Uppsala exchange has involved 29 University of Minnesota Law School faculty members and 26 Uppsala University Law Faculty members, in addition to the 497 students from both institutions who have studied abroad at the sister law school. Below is a list of the faculty participants.

University of Minnesota Law School Faculty Members Participating in the Exchange Program with Uppsala (Total: 29)

Name	Year
Carl Auerbach	1983
Ferdinand Shoettle	1984
Barry Feld	1985
Carol Rieger	1986
Katheryn Price	1987
Daniel Gifford	1988
None	1989
Kathryn Price	1990
Daniel Farber	1990
Barry Feld	1991
Daniel Gifford	1992
Kathryn Sedo	1993
Ann Burkhart	1993
Donald Lay	1994
Stephen Befort	1995
Barry Feld	1996
John Cound	1997
Donald Fraser	1998

* Appendix by Professor Robert A. Stein.

Stephen Befort	1999
Ann Burkhart	1999
Laura Cooper	2000
Michael Paulsen	2001
Laura Cooper	2002
Maury Landsman	2003
Jean Sanderson	2004
Suzanne Thorpe	2005
Laura Cooper	2006
Barry Feld	2007
Suzanne Thorpe	2008
Jean Sanderson	2009

Uppsala University Law Faculty Members Participating in the Exchange Program with Minnesota (Total: 26)

Name	**Year**
Stig Strömholm	1983
Anders Folgelklou	1984
Kent Källström	1985
Ulf Göranson	1986
Nils Mattsson	1987
Anders Agell	1988
Göran Lysén	1989
Hannu Tapani Klami	1990
None	1991
Rolf Nygren	1992
Lena Marcusson	1993
Bertil Wiman	1993
Torben Spaak	1994
Inger Österdahl	1995

Bertil Bengtsson	1996
Tore Sigeman	1996
Torben Spaak	1996
Åke Frändberg	1997
None	1998
Elisabeth Rynning	1999
Carl Hemström	1999
Mats Kumlien	2000
Maja Kirilova Eriksson	2001
None	2002
None	2003
Olle Lundin	2004
Torben Spaak	2005
None	2006
Thérèse Björkholm	2007
Jan Darpö	2008
Ingrid Helmius	2009